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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the
Supreme Court of the State of California

ROBERT FREMLIN
Two Embarcadero Center
26th Floor
San Francisco, California 94111
Telephone: (415) 421-4600
Attorney for Petitioners

LILLICK MCHOSE & CHARLES
ROBERT KAVANAUGH
Two Embarcadero Center
26th Floor
San Francisco, California 94111
Telephone: (415) 421-4600
Of Counsel

TOLPEGIN, IMAI & TADLOCK
ANDRE V. TOLPEGIN
235 Montgomery Street, Suite 950
San Francisco, California 94104
Telephone: (415) 989-8676
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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VS.

WESTERN INSTITUTE OF RETAILING, INC.,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
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Petitioners American Broadcasting Companies, Inc., Christine Lund, Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis Keefer pray that a Writ of Certiorari issue to review the opinion of the Supreme Court of the State of California, entered on November 29, 1979, on which rehearing was denied on January 17, 1979.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 25 Cal. 3d 763, 160 Cal. Rptr. 97, 603 P.2d 14 (1979), and is set forth in Appendix pages A-1 through A-11. The order denying petitioner's petition for rehearing was not

published but is set forth in Appendix page B-1. The opinion of the California Court of Appeal was initially published but, pursuant to California procedure, was automatically vacated and deleted from the reports when the California Supreme Court granted a hearing. It is reported unofficially at 4 Media L. Rptr. 1990 (1979), and appears in Appendix pages C-1 through C-14. The order of the California Court of Appeal denying respondents' petition for rehearing is not published but is set forth in Appendix page D-1. The judgment of the Superior Court of the State of California in favor of petitioners American Broadcasting Companies, Inc., and Christine Lund was not published but appears in Appendix pages E-1 through E-2. The judgment of the Superior Court of the State of California in favor of petitioners Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis Keefer was not published but appears in Appendix pages F-1 through F-4.

JURISDICTION

On November 29, 1979, the California Supreme Court filed its order reversing the judgments of the trial court in favor of petitioners. A petition for rehearing was timely filed on December 14, 1979, and was denied on January 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

QUESTIONS PRESENTED

1. Did the California Supreme Court err in denying a news broadcaster who reported Better Business Bureau allegations of fraudulent merchandising practices the protection of the actual malice standard of *New York Times*

Co. v. Sullivan in a defamation suit where the reason for denying the standard's protection was that "criticism of commercial conduct does not merit the special protection of the actual malice test"?

2. Did the California Supreme Court err in refusing to hold that the United States Constitution requires corporate plaintiffs in defamation actions to prove actual malice whether or not they are public figures?

3. Did the California Supreme Court violate the rights of petitioners to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution when, in violation of California law, it refused to consider arguments under Article I, section 2 of the California constitution which, if accepted, would require affirmance of the judgment of the trial court?

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

There are two groups of petitioners represented below by separate counsel. The first consists of American Broadcasting Companies, Inc. ("ABC"), which owns San Francisco television station KGO-TV Channel 7, and Christine Lund, who at relevant times was a consumer affairs re-

porter for the station. The second group of petitioners consists of Better Business Bureau of San Francisco, Ltd. ("Better Business Bureau"), Charles R. Thurber, who at relevant times was president of Better Business Bureau, and Louis Keefer, who at all relevant times was a Better Business Bureau investigator. Respondents Western Institute of Retailing, Inc. and Vegod Corporation are corporations organized under the laws of California.

Petitioners adopt as part of their Statement of the Case the following paragraphs from the opinion of the California Supreme Court:

> Respondent corporations are engaged in closing out stores that have failed or are going out of business. Respondents arranged to conduct a "closing out sale" for the City of Paris, a respected San Francisco department store, opened in 1850 and described by the trial court as a "landmark store". When the store's end appeared imminent in 1972, it was widely reported by the news media. Bargains were widely advertised. Respondents also rented space to concessionaires who brought in outside merchandise according to their own practices and procedures.
>
> A Better Business Bureau spokesman advised a KGO-TV reporter [petitioner Lund] that [respondents] were selling inferior merchandise at inflated prices. KGO-TV notified respondents of its intention to broadcast the story. One broadcast stated: "The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the closeout

> campaign. The watchdog agency says two outside companies, Vega [sic] Corporation and Western Institute of Retailers [sic], have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all. (App., p. A-2.)

Respondents filed a defamation action in April 1972 against petitioners. Prior to empaneling the jury, the trial court ruled that respondents were "public figures" within the meaning of *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and its progeny, and, therefore, were required to prove "actual malice" as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Respondents stipulated that they could not prove actual malice, and judgments were entered against them and in favor of each of the two groups of petitioners.

Respondents appealed to the California Court of Appeal, claiming that the trial court had erred in ruling they were public figures. Petitioners contended that respondents were public figures and that the decision should be affirmed for the additional reason that California law as well as the federal constitution required application of the actual malice standard. The Court of Appeal affirmed the judgment of the trial court and held that respondents (collectively referred to by the court as "Vegod") were public figures:

> From the foregoing uncontroverted evidence and discussion we conclude as a matter of law: (1) that the "demise" of the City of Paris and the disposition of its merchandise were matters of legitimate "public inter-

> est"; (2) that Vegod, an otherwise private person, voluntarily injected itself into those matters of public interest by its widespread advertising, and its management, of the store's "closeout" sale; and (3) that Vegod thereby became a "public figure" within the meaning of *Curtis Publishing Co. v. Butts* and *Gertz v. Robert Welch, Inc.* (App., p. C-10.)

The Court of Appeal did not reach the state law ground for affirmance because its determination that respondents were public figures disposed of the appeal. Respondents petitioned the Court of Appeal for a rehearing and the petition was denied.

Thereafter, respondents' petition for a hearing before the California Supreme Court was granted. A majority of the justices of the California Supreme Court reversed the trial court and held that respondents were not required to prove actual malice. The reasoning of the majority was that the subject matter of the news reports—deceptive merchandising practices perpetrated on shoppers during a closeout sale at a long-respected department store—did not merit the protection of the actual malice standard. According to the majority:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. (App., p. A-8.)

In reversing the Court of Appeal and the trial court, the California Supreme Court cited no authority for its holding, nor did it disclose its reasoning. The court did not consider petitioners' alternative argument that respondents were required by California law to prove actual malice whether or not respondents were public figures for federal

constitutional purposes. Petitioners raised these points in their petition for rehearing which was denied without opinion on January 17, 1980.

Two justices of the California Supreme Court dissented. They agreed with the lower courts that respondents were public figures, and concluded that the federal and the California constitutions required application of the actual malice standard.

REASONS FOR GRANTING THE WRIT

1. The California Supreme Court's Test for Application of the Actual Malice Standard was Proscribed in Gertz v. Robert Welch, Inc., and as a Result of the Decision, the Actual Malice Standard Is Now Denied to all Publications Criticizing Commercial Conduct

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), determined the extent to which the federal constitution derogates from the common law rule of strict liability for defamatory publications. *Gertz* held that liability for defamation could never be imposed absent a showing of fault. Where the plaintiff is a public official or a public figure, the fault must constitute "actual malice", namely, publication with knowledge of falsity or in reckless disregard for truth or falsity.

Plaintiffs are required to prove fault in defamation actions because misstatements are inevitable, and, therefore, a rule of strict liability does not adequately protect First Amendment freedoms:

> Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless

> inevitable in a free debate . . . And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. [*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).]

Public figures are required to prove "actual malice" because they have invited attention and comment through the prominence they have assumed in the affairs of society. *Id.* at 345.

Gertz rejected the plurality opinion in *Rosenbloom v. Metromedia,* 403 U.S. 29 (1971). The *Rosenbloom* approach did not depend upon the public or private character of the plaintiff, but required proof of actual malice whenever society had a sufficient interest in learning about the substance of the communication. *Rosenbloom* therefore focused on the societal value of the communication rather than the public or private character of the plaintiff.

Here, the majority of the California Supreme Court cited *Gertz* but followed the *Rosenbloom* approach. The court's holding was that respondents were not required to prove actual malice against petitioners because the subject matter of the news report did not deserve protection. The subject matter was deceptive merchandising practices perpetrated against the public at a closeout sale of a "respected" 122-year-old "landmark" department store. According to

the California Supreme Court majority, comment on deceptive merchandising practices exposes the broadcaster to the full range of defamation liability because:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. (App., p. A-8.)

This Court rejected *Rosenbloom*'s focus on the subject matter of the communication because, among other reasons, it requires courts to determine " 'what information is relevant to self government' ". *Gertz v. Robert Welch, Inc.*, 418 U.S. at 346; *Accord, Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976).

This case demonstrates dramatically the dangers inherent in conditioning the actual malice standard on a judicial determination of "relevancy" of subject matter. Regardless of the public or private character of a plaintiff, California has exempted from the protection of the actual malice standard all communications about matters of interest to consumers—for no reason other than that the California Supreme Court considers such communications undeserving of such protection, notwithstanding that other courts routinely recognize the worth of consumer reporting. Among the decisions praising such reporting are two which are cited favorably by the California Supreme Court in its majority opinion: *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977), and *Reliance Insurance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977). *Trans World Accounts* found consumer reporting "essential" to protect the public:

> If the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him utilizing such prohibitive conduct. [425 F. Supp. at 820, *quoting Federal Trade Commission v. Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968).]

In *Reliance Insurance,* the court commended Barron's for reporting on a stock offering while it was being proposed and, therefore, while there was still time to warn the public:

> It is beyond dispute that the article would have its greatest impact on the public if it appeared prior to the sale. This desire to publish prior to the sale is praiseworthy rather than blameworthy. Prior to the sale, the offering was "hot news" in the financial community. If the function of the financial press is to inform and educate the investing public with hot news, which we believe it is, then the editors have an actual duty to publish at the time of greatest benefit. After the issue had been sold, news bearing on its investment quality would have been of no use to the readers. (442 F. Supp. at 1351.)

Another opinion in *Reliance Insurance v. Barron's* also stressed the importance of consumer reporting:

> Investigative reporting is not limited to the impeachment of presidents or the exposure of licentious congressmen. The public interest is served equally when reporters find a "Deep Throat" in the executive suite, and when an accounting professor spotlights for the financial press, in common language, business dealings he regards as improper, improvident or unfair to investors. Whether his conclusions are right is to be re-

> solved generally in the free marketplace of ideas. [428 F. Supp. 200, 205 (S.D.N.Y. 1977).]

The California Supreme Court not only revived the *Rosenbloom* opinion which was discredited by this Court in *Gertz*, it used *Rosenbloom* to reach a result that is as aberrational as it is unconstitutional. In denying petitioners the protection of the First Amendment, the court excluded from protection, as "undeserving", all communications criticizing commercial conduct—communications of the highest social utility.

The California Supreme Court's decision will have a chilling effect on consumer reporting. Deprived of the protection of the actual malice standard, news reports of deceptive merchandising practice and dangerous products will more frequently become subject to litigation. Lawsuits will be more protracted and expensive. Of necessity, publishers will be more timorous, and as a result the public will be denied information it needs to protect itself. Inevitably, the public will be the loser. This constriction in the flow of information to the public is precisely that which this Court sought to eliminate by its decision in *Gertz v. Robert Welch, Inc.*

2. Lower Court Decisions Conflict Over Whether the Differences Between Corporations and Natural Persons Require that the Actual Malice Standard Be Applied Differently to Each.

This Court has never decided a defamation action in which the plaintiff is a corporation. The distinction between corporations and natural persons is significant in defamation cases because, unlike persons, corporations have no pri-

vate lives and cannot suffer shame, mortification or hurt feelings. The only injury corporations can suffer is financial.

The United States District Court for the District of Columbia in *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976), analyzed the differences between corporations and individuals in the context of defamation law. The court concluded that corporate plaintiffs require less protection than persons and should be required to prove actual malice even when they are not public figures:

> Corporations, which do not possess private lives to begin with, must similarly be denied full protection from libel. Stated another way, the "public figure" standards set out in *Gertz* are designed to ascertain whether a person, through his activities, has lost claim to his private life. It makes no sense to apply these standards to a corporation, which, regardless of its activities, never has a private life to lose. . . . It is, therefore, the holding of this court that actual malice must be proved with convincing clarity in any libel action brought by a corporation against a mass media defendant, if the defendant establishes that the publication in issue concerns matters of legitimate public interest. (417 F. Supp. at 955-56.)

The approach of *Martin Marietta* is consistent with the rationale of this Court's holding in *Gertz v. Robert Welch, Inc.* This Court emphasized therein that the public figure test for determining application of the actual malice standard is an accommodation between two legitimate, competing interests: the interest of the state in providing com-

pensation for injurious falsehoods and the interest of society in avoiding news media self-censorship with the consequent deprivation of information. The district court in *Martin Marietta* recognized that corporations require less protection from injurious falsehoods than individuals, and, therefore, reached a different accommodation between the two competing interests.

Two other federal district courts have declined to distinguish between corporations and persons in applying the actual malice standard: *Reliance Insurance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977), and *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (N.D. Cal. 1977). This was the view of the California Supreme Court in this case.

A fundamental conflict, therefore, exists among lower courts as to how the competing societal interests identified in *Gertz* should be reconciled where the plaintiff is a corporation. The necessity for this Court to resolve the issue is manifest because of the pervasive influence of corporations. Corporations dominate the manufacturing and marketing sectors of the economy, and news reports informing the public about products or merchandising practices will predominately involve corporations. A decision by this Court defining the actual malice standard as applied to corporate plaintiffs will resolve the conflict in the circuits and determine the extent to which publishers can inform the public on corporate activities.

3. Petitioners Were Denied Due Process Under the Fourteenth Amendment Because the California Supreme Court Violated Its Own Case Law Requiring It to Consider All Arguments Supporting a Judgment.

California law requires an appellate court to affirm the holding of a lower court if there is any basis on which the holding can be sustained:

> "The fact that the action of the [lower] court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [*D'Amico v. Board of Medical Examiners*, 11 Cal. 3d 1, 18-19, 112 Cal. Rptr. 786, 799 (1974), *quoting Davey v. Southern Pacific Co.*, 116 Cal. 325, 329, 48 P. 117 (1897).]

Petitioners argued in the California Court of Appeal and in the California Supreme Court that the California constitution, as well as the federal constitution, required respondent corporations to prove actual malice. The argument was based on the responsibility of California courts to interpret the California constitution independently of the federal. *People v. Disbrow*, 16 Cal. 3d 101, 114-15, 127 Cal. Rptr. 360, 368 (1976); *accord, People v. Brisendine*, 13

Cal. 3d 528, 549-50, 119 Cal. Rptr. 315, 318-29 (1975). In discharging this responsibility, the California Supreme Court has held that article 1, section 2 of the California constitution requires that the rights of free speech and free press require "great solicitude":

> A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press. . . . [I]n this state we have consistently viewed with great solicitude the right to uninhibited comment on public issues. (*Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 119 Cal. Rptr. 458 (1975).)

This language has been suggested as compelling application of the actual malice standard even where the federal constitution does not. *Lewis v. Time, Inc.*, 83 F.R.D. 455 (E.D. Cal. 1979).

Because the court of appeal affirmed the trial court on the federal constitutional ground, California law did not require it to consider the alternative state law ground. The California Supreme Court, however, rejected the federal constitutional ground, and as a result was required to consider the state ground—but did not. In their petition for rehearing, petitioners drew the court's attention to the alternative state ground for supporting the trial court's judgment and to the court's duty under California law to rule. The petition was denied without opinion.

This Court has held that lawful rules and procedures are binding on the government officials and agencies that promulgate them. *Yellin v. United States*, 374 U.S. 109 (1963); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954). This

principle applies to the executive branch (*United States v. Nixon*, 418 U.S. 683 (1974)), and the legislative (*Yellin v. United States*, 374 U.S. 109 (1963)). Although no court known to petitioners has so held, petitioners contend that the due process clause requires no less from the judicial branches of state governments.

Application of the principle to the judicial branch is especially appropriate in this case because due process also requires "that there be an opportunity to present every available defense". *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). The opportunity must be granted in a meaningful time and manner. *Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971). The obvious purpose of the California rule requiring a court to consider all grounds supporting a lower court decision is that it avoids a wasteful remand for further proceedings that will inevitably result in affirmance. The rule assures that issues are resolved expeditiously.

The court's only explanation for its refusal to consider petitioners' state law argument in support of the judgment requiring proof of actual malice was that respondents' stipulation of their inability to prove malice was "limited to the First Amendment privilege under *New York Times v. Sullivan*", 376 U.S. 254 (1964). This is a misinterpretation of the record because respondents' stipulation was not so limited. Respondents stipulated that they could not prove "actual malice *within the meaning* of *New York Times v. Sullivan*" (Clerk's Trans., p. 110, ll. 9-10 [emphasis added]). Petitioners' argument was that California law

under the circumstances of this case required proof of actual malice *within the meaning* of *New York Times*. Thus, respondents' stipulation was effective and the California Supreme Court was required under state law to address the issue.

This case began in October 1972, almost eight years ago. To require petitioners to reargue a question of law in the trial court which must be ultimately determined on appeal will put them to needless expense, cause unnecessary delay, and deny them due process by denying them a meaningful hearing on all arguments at a meaningful time.

CONCLUSION

The California Supreme Court applied a "subject matter" standard for the actual malice test that this Court specifically rejected in *Gertz*. It denied to all consumer reporting the protection of the actual malice standard and thereby denied the public access to information it needs to protect itself from fraudulent merchandising practices and dangerous products. The court violated California law by refusing to consider petitioners' argument that article 1, section 2 of the California constitution requires respondents to prove actual malice.

Review by this Court of the decision will not only correct the errors of the California Supreme Court and destroy the precedential effect of an unconstitutional opinion, it will also resolve the significant conflict that exists among the circuits concerning the circumstances under which corporate plaintiffs must prove actual malice in defamation actions.

For the foregoing reasons, petitioners respectfully request that this Court grant a writ of certiorari to review the decision of the California Supreme Court.

Dated: April 16, 1980

Respectfully submitted,

ROBERT FREMLIN
Attorney for Petitioners

LILLICK MCHOSE & CHARLES
ROBERT KAVANAUGH
Of Counsel

TOLPEGIN, IMAI & TADLOCK
ANDRE V. TOLPEGIN
Of Counsel

(Appendices Follow)

Appendices

Appendix A

In the Supreme Court
of the
State of California

S.F. 23999
Super. Ct. 652-227

Vegod Corporation et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., et al.,
Defendants and Respondents.

[Filed Nov. 29, 1979]

SEE DISSENTING OPINION

In this defamation action the trial court ruled that plaintiffs are "public figures" within the meaning of Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 and that actual malice is an essential element of plaintiffs' cause of action. Plaintiffs conceded they are unable to prove defendants acted with actual malice within the holding of New York Times v. Sullivan (1964) 376 U.S. 254. Judgment was granted defendants, and plaintiffs appeal. We reverse.

Plaintiff corporations are engaged in closing out stores that have failed or are going out of business. Plaintiffs arranged to conduct a "closing out sale" for the City of Paris, a respected San Francisco department store, opened in 1850 and described by the trial court as a "landmark

store." When the store's end appeared imminent in 1972, it was widely reported by the news media. Bargains were widely advertised. Plaintiffs also rented space to concessionaires who brought in outside merchandise according to their own practices and procedures.

A Better Business Bureau spokesman advised a KGO-TV news reporter that plaintiffs were selling inferior merchandise at inflated prices. KGO-TV notified plaintiffs of its intention to broadcast the story. One broadcast stated: "The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the close-out campaign. The watchdog agency says two outside companies, Vega [*sic*] Corporation and Western Institute of Retailers [*sic*], have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all."

In New York Times v. Sullivan, *supra,* 376 U.S. 254, 269 et seq., the Supreme Court determined that public officials may not recover damages for defamation unless they show defendant acted with actual malice. While recognizing the First Amendment does not protect libelous statements, the court reasoned that erroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable

self-censorship. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." (376 U.S. at p. 279.) The court defined "actual malice" as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at pp. 279-280.)

Three years later in Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155, the court held that public figures —like public officials—must prove actual malice to recover for defamation. Although the court did not give us an encompassing definition of public figure, it held the plaintiffs in the two cases before it met the public figure test. In one, the plaintiff was an athletic director of a state university who was employed by a private corporation rather than the state. The libelous statement was a report covering an alleged conversation between him and a coach of another university and the ensuing football game between the two universities. Plaintiff in the second was a retired Army officer who had "thrust himself into the 'vortex' of the controversy" over admission of a black to a state university, and the libelous statement related to his conduct with respect to a riot at the university. (388 U.S. at pp. 140-142, 146.)

The Supreme Court again sought to strike a balance between vindication of honor through defamation law on one side and free speech and press protected by the First Amendment on the other in Gertz v. Robert Welch, Inc., *supra,* 418 U.S. 323. The court recognized that, while false statements of fact enjoy no constitutional protection, per-

mitting strict liability for false statement impairs First Amendment liberties by deterring speech that matters. The court also recognized the state has a legitimate interest in protecting reputation. The court defined public figures: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (*Id.*, at p. 351.)

Distinguishing between private and public figure the court reasoned that public figures ordinarily will have significantly greater access to the media to contradict lie and error than will private individuals, and that those classed as public have voluntarily thrust themselves to the fore, inviting attention and comment and exposing themselves to increased risk of defamatory falsehood. Private persons by contrast have not undertaken an " 'influential role in ordering society.' " (418 U.S. at pp. 344-345.)

Gertz was an attorney employed to bring a wrongful death action by the family of a person killed by a police officer convicted of second degree murder. The alleged libelous article asserted that the conviction was a frameup, part of a Communist conspiracy, and it claimed that Gertz had Communist connections.

Recognizing that Gertz had been active in community and professional affairs, the court stated: "We would not lightly assume that a citizen's participation in community

and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

"In this context it is plain that petitioner was not a public figure. He played a minimum role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation." (418 U.S. at p. 352.)

Although private persons are not necessarily required to prove actual malice to recover for defamation, states may not impose liability without fault. In such cases, the state may determine the fault standard to apply. (418 U.S. at p. 347.)

In Time Inc. v. Firestone (1976) 424 U.S. 448, the court again considered the meaning of the term "public figure." Time magazine erroneously reported that a divorce

was granted to Mr. Firestone on grounds of extreme cruelty and adultery. Time argued that Mrs. Firestone was a "public figure" since the 17-month trial attracted national attention, eliciting 88 articles in Miami and Palm Beach newspapers. Mrs. Firestone had also given several press conferences and was a prominent member of Palm Beach society.

Rejecting Time's argument the court stated: "[P]etitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position, stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 U.S., at 346, 94 S.Ct., at 3010 [¶] Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz,* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense

than that of the defendant called upon to defend his interests in court." (*Boddie v. Connecticut,* 401 U.S. 371, 376-377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971). Her actions, both in instituting the litigation and in its conduct were quite different from those of General Walker in *Curtis Publishing Co., supra.* She assumed no 'special prominence in the resolution of public questions.' *Gertz, supra,* 418 U.S., at 351, 94 S.Ct., at 3013. We hold respondent was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce." (424 U.S. at pp. 454-455; fn. omitted.)

Defendants argue that the demise and closing out sale of the City of Paris were matters of public controversy because it was a "landmark store." Even assuming the venerable store's planned destruction created a public controversy, those conducting the subsequent close-out sale cannot be said to have thrown themselves into the vortex of that controversy. It does not appear that plaintiffs urged City of Paris publicly or otherwise to terminate business or to destroy the "landmark." Merely doing business with parties to a public controversy does not elevate one to public figure status.

Defendants also urge that by selling goods to the public and by advertising the sale plaintiffs became public figures. In *Gertz* the court in concluding that he was not a public figure pointed out that Mr. Gertz had never discussed the civil or criminal litigation with the press. In *Firestone* the court pointed out that Mrs. Firestone did not seek publicity on the propriety of her marital conduct.

While availability of goods for sale and their quality are matters of public interest, this is not the test. The public interest test was expressly rejected in *Gertz* (418 U.S. at p. 346), and in *Firestone* (424 U.S. at pp. 455-456), in favor of the public controversy test. (See also Hutchinson v. Proxmire (1979) 47 U.S.L. Week 4827, 4833-4834.)

Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (Herbert v. Lando (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.[1]

Pointing out that *Gertz* and *Firestone* relied on individual interests in reputation, one federal district court has held that in defamation actions corporations must prove malice in fact whenever the defamatory statement relates to a matter of public interest. (Martin Marietta Corp. v. Evening Star Newspaper (D.C. 1976) 417 F.2d 947, 954-956.) However, two other federal district courts have rejected the proposed distinction. (Reliance Insurance Co. v. Barron's (S.D.N.Y. 1977) 442 F.Supp. 1341, 1347-1348; Trans World Accounts, Inc. v. Associated Press (N.D. Cal. 1977) 425 F.Supp. 814, 819.)

---

[1]Because plaintiffs' stipulation related to the First Amendment privilege under New York Times v. Sullivan, *supra*, 376 U.S. 254, we consider only that federal privilege and do not express any view as to whether the statements were priviliged under California law.

In California, a corporation's right and redress against defamation is well established. (DiGiorgio Fruit Corp. v. American Federation of Labor (1963) 215 Cal.App.2d 560; Daniels v. Sanitarium Assoc., Inc. (1963) 59 Cal.2d 602, 609; Hotel and Restaurant Employees Union v. Anaheim Operating, Inc. (1978) 82 Cal.App.3d 737, 752; Triton Insurance Underwriters, Inc. v. Mutual Chiropractic Insurance Co. (1965) 232 Cal.App.2d 829, 832; see also, Civ. Code, § 45; Rest.2d Torts, § 561.)

Rejecting the distinction between individuals and corporations in *Martin Marietta*, the court in Trans World Accounts, Inc. v. Associated Press, *supra*, 425 F. Supp. 814, 819, reasoned: "[A]t least in this case governed by California substantive law, there is no distinction between the protectible interest in reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages. (*DiGiorgio Fruit Corp. v. American Federation of Labor*, 215 Cal. App.2d 560, 30 Cal.Rptr. 350, 355-356 (1963); compare Martin Marietta Corp. v. Evening Star, above, at 955. [¶] While it is true that the Supreme Court's opinions in these cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defama-

tion claims, the distinction between corporations and individuals is one without a difference."

The judgment is reversed.

CLARK, J.

WE CONCUR:
TOBRINER, J.
MOSK, J.
RICHARDSON, J.
MANUEL, J.

Vegod v. American Broadcasting Companies, Inc.
S.F. 23999

DISSENTING OPINION BY NEWMAN, J.

Citing New York Times v. Sullivan, 376 U.S. at 269 et seq., the majority opinion concludes (*ante* p. 3): "[E]rroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable self-censorship."

The California Constitution ensures that those words apply here. Article I, § 2 commands that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

Was there an abuse of that right here? The majority so conclude, arguing (1) that the facts show no public controversy, and (2) that plaintiffs had not attained "public figure status". I disagree. I think it is clear that inner-city "close-out sales" in our era do inspire controversial concerns; and the "landmark" character of the building here merely helped to publicize those concerns and make them more newsworthy. Plaintiffs indeed did decide to thrust themselves into the vortex of that controversy, whether or not they already had become public figures.

NEWMAN, J.

I Concur:
BIRD, C.J.

Appendix B

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Jan. 17, 1980

I have this day filed Order

REHEARING DENIED

In re: SF No. 23999

VEGOD CORP.

vs.

AMER BROADCAST COS.

Respectfully,

G. E. BISHEL
Clerk

Appendix C

SEE DISSENTING OPINION

CERTIFIED FOR PUBLICATION

In the Court of Appeal
of the
State of California

First Appellate District

Division One

1 Civ. No. 42363
(Super. Ct. No. 652227)

Vegod Corporation et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., et al.,
Defendants and Respondents.

[Filed Jan. 3, 1979]

Vegod Corporation and Western Institute of Retailing, Inc., commenced an action for damages for slander against American Broadcasting Companies, Inc., American Broadcasting Company KGO-TV Channel 7, Better Business Bureau of San Francisco, certain of those defendants' employees, and others. Concluding that the plaintiffs were "public figures," and upon being advised that they were unable to prove the defendants' "actual malice" within the

requirement of *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, the superior court entered judgments in favor of the defendants. Plaintiffs thereupon appealed.

The uncontroverted facts before the superior court and reasonable inferences therefrom were as follows.

The "City of Paris" was a well-known and long-respected San Francisco department store. Its age equaled that of the State of California; its doors were first opened in 1850. Apparently drawing upon judicial knowledge (see Evid. Code, § 451, subd. (f)), the superior court described it as a "landmark store," and counsel seemed in agreement that it was a highly regarded "department store that has been in San Francisco since the Gold Rush, that is famous for its Christmas celebrations that children of every age of San Francisco had been going to for years, . . ." But the "demise" of the store, in 1972, was imminent; the news media had widely reported that it soon would go out of business.

Plaintiffs are Vegod Corporation and Western Institute of Retailing, Inc., to whom collectively and for convenience we shall hereinafter refer in the singular as Vegod. Vegod had a common management, and to a large extent, common ownership. Vegod's "main business was the 'closing out' of . . . stores" that had failed, or were otherwise going out of business. Arrangements of some kind were made with the City of Paris for Vegod to conduct a "closing out," and "total," sale of its merchandise. The sale received wide newspaper advertising of thebargains to be found in the City of Paris merchandise inventory. In the course of the "closing out" sale, merchandise was brought into the store for sale by Vegod from as far away as Chicago. Indeed, "both plaintiffs brought in merchandise to the City of Paris from other

stores, . . ." And space was rented by Vegod to concessionaires who themselves "brought in merchandise in accordance with their own merchandising practices and procedures."

An official of Better Business Bureau of San Francisco interviewed a "KGO-TV Channel 7" news reporter. He advised her, among other things, that "shoppers who visited the City of Paris were likely to find 'distress' and out-of-season merchandise instead of the high-quality clothing normally offered by the store. [He] also stated that garments bore misleading tags which made it appear that clothing offered for sale at its full retail price was discounted in price," and that the price of merchandise offered to the public might be four times the price paid by Vegod.

Thereafter, upon notice to Vegod of the intent so to do in compliance with some official regulations, the reporter, with the approval of KGO-TV Channel 7, broadcast the following news report:

"The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly, but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the close-out campaign. The watchdog agency says two outside companies, Vega [sic] Corporation and Western Institute of Retailers [sic] have been brought in to handle the close-out, a close-out the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all."

That broadcast, and some others which were similar in context, were the subjects of Vegod's action.

Pretrial conferences were held between the court and counsel for the respective parties. The discussions centered around whether Vegod was a "public figure" required by law to prove "actual malice" on the part of the defendants. Vegod, as previously indicated, conceded an inability to prove such "actual malice" by "clear and convincing evidence." After appropriate argument on this issue, the here questioned judgments were entered.

New York Times Co. v. Sullivan, supra, 376 U.S. 254, in 1964 announced the rule that a *"public official"* is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (Pp. 279-280.) And, said the court, the proof of such "actual malice" must be made with "convincing clarity." (Pp. 285-286.)

Three years later the high court extended its rule to include "public figures." In *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130, 155, the court asserted: "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." The court carefully added: "Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny, . . ."

A person may attain the status of a "public figure" in either of two ways, according to *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 351: "That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. *More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.* In either case such persons assume special prominence in the resolution of public questions." (Emphasis added.)

It is the latter of the "two alternative bases" with which we are here concerned.

Some confusion attended the superior court proceedings of this case. The parties appear to have understood *Gertz v. Robert Welch, Inc.* as *necessarily* requiring a "public *controversy*" for the application of that authority's second alternative.

In *Gertz v. Robert Welch, Inc.*, there happened to have been a public *controversy* into which the court specifically found the plaintiff had not injected himself, and it accordingly addressed itself to the issue in what was there appropriate language. But from similar high authority it becomes manifest that the meaning is *a matter of "public interest"* which, of course, includes "public controversy." Thus, in *Curtis Publishing Co. v. Butts,* supra, 388 U.S. 130, where there had been no controversy before the claimed defamation of a "public figure," the members of the court described the criteria as those of "public interest," and the public's

"legitimate and substantial interest." (Pp. 149, 154-155, 165.) Likewise in *Time, Inc. v. Hill* (1967) 385 U.S. 374, 383-387, the court spoke only of "public interest," and "substantial public interest," as the necessary element of *New York Times Co. v. Sullivan's* First Amendment privilege.

Lesser federal courts have variously described the required element as a matter of "public interest" (Man v. Warner Bros. Inc. (S.D.N.Y. 1970) 317 F.Supp. 50, 52-53; Konigsberg v. Time, Inc. (S.D.N.Y. 1970) 312 F.Supp. 848, 851), "great public interest" (Dacey v. Florida Bar, Inc. (5th Cir. 1970) 427 F.2d 1292, 1295; Bon Air Hotel, Inc. v. Time, Inc. (5th Cir. 1970) 426 F.2d 858, 861), "legitimate public interest" (Bon Air Hotel, Inc. v. Time, Inc., supra, p. 861, fn. 3; Martin Marietta Corp. v. Evening Star Newspaper (D.D.C. 1976) 417 F.Supp. 947, 956), "public or general concern" (Rosanova v. Playboy Enterprises, Inc. (S.D.Ga. 1976) 411 F.Supp. 440, 444), or " 'in which the public has a justified and important interest' " (Cepeda v. Cowles Magazines and Broadcasting, Inc. (9th Cir. 1968) 392 F.2d 417, 419 [cert. den., 393 U.S. 840]), or which is "naturally entitled to public gaze and interest" (United Medical Laboratories v. Columbia Broadcasting Sys. (9th Cir. 1968) 404 F.2d 706, 712 [cert. den., 394 U.S. 921]). No such authority is found which requires a "public *controversy*."

We continue our consideration of *Gertz v. Robert Welch, Inc.*'s second basis for status as a "public figure," i.e., where the "individual voluntarily injects himself" into a matter of

public interest. Such a party, while not "a public figure for all purposes" (Martin Marietta Corp. v. Evening Star Newspaper, supra, 417 F.Supp. 947, 957), is nevertheless "a public figure for a limited range of issues" (418 U.S., p. 351). Having voluntarily injected himself into a matter of public interest, he becomes a "public figure" in respect of that matter, within the meaning of *New York Times Co. v. Sullivan, Curtis Publishing Co. v. Butts,* and *Gertz v. Robert Welch, Inc.*

We point to a few illustrations where one seeking damages for defamation has been held a "public figure" within the meaning of this rule.

Dacey v. Florida Bar, Inc., supra, 427 F.2d 1292: Dacey, a private person and author, who made many radio and television appearances promoting his book, thereby became "a public figure" unentitled to damages for lack of proof of actual malice, following a personal defamatory attack upon him in a review of the book. *Martin Marietta Corp. v. Evening Star Newspaper,* supra, 417 F.Supp. 947: An otherwise private corporate contractor, by engaging in national defense contracts, thereby became a "public figure," subject to *New York Times Co. v. Sullivan*'s required proof of actual malice, in a defamation action against a newspaper which had published a story of its alleged improper relations with government officials. *Buchanan v. Associated Press* (D.D.C. 1975) 398 F.Supp. 1196: Buchanan, a privately practicing accountant, voluntarily involved himself in a political campaign. He was held a "public figure" in respect of claimed libelous publications relating to the campaign's irregular financing. *Rosanova v. Playboy Enter-*

prises, Inc., supra, 411 F.Supp. 440, 442: Rosanova, a private person, who disported himself with notorious underworld figures, thereby attained the status of a "public figure" in respect of a defamatory publication referring to a "'host of California mobsters, including . . . Rosanova'" *Man v. Warner Bros. Inc., supra,* 317 F.Supp. 50: Man, a private person and musician, became a "public figure" in relation to a "Woodstock Festival" where he voluntarily performed before many people, thus foregoing claim for damages against Warner Bros. Inc. for filming and recording his rendition for profit.

Vegod relies heavily upon the cases of *Time, Inc. v. Firestone* (1976) 424 U.S. 448, and *Gertz v. Robert Welch, Inc.,* supra, 418 U.S. 323, where the allegedly defamed persons were not held to *New York Times Co. v. Sullivan's* strict requirement of establishing actual malice. We find them to be of no aid to Vegod. In *Time, Inc. v. Firestone,* the high court found the Firestones' divorce dispute was "not the sort of 'public controversy' referred to in Gertz" (p. 454) even though of morbid interest to some. And the court expressly concluded that by their appearance in the divorce action the parties had *not* "'*voluntarily* exposed [themselves] to increased risk of injury from defamatory falsehood, . . .'" (P. 456; emphasis added.) In *Gertz v. Robert Welch, Inc.,* a lawyer had represented the family of a homicide victim in a civil action against his alleged murderer. His participation in the overall affair "related solely to his representation of a private client" (p. 352), and he had taken no part in the criminal prosecution resulting in a murder conviction. The high court stated: "He plainly did

not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation." (418 U.S., p. 352.) In neither of these cases had the allegedly defamed person become *voluntarily* involved in a matter of public interest.

The need that a private person *voluntarily* inject himself into a matter of public interest in order to acquire "public figure" status has otherwise been manifested by the nation's high court. In *Gertz v. Robert Welch, Inc.*, the court expressly repudiated its earlier plurality opinion holding that "a private citizen *involuntarily* [emphasis added] associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test." (418 U.S., pp. 337-339; and see Trans World Accounts, Inc. v. Associated Press (N.D.Cal. 1977) 425 F.Supp. 814, 818-819; Rosanova v. Playboy Enterprises, Inc., supra, 411 F.Supp. 440, 443.)

Vegod's only contention on its appeal is expressed in this manner: "The court erred in classifying plaintiffs Vegod and [Western Institute of Retailing, Inc.] as 'public figures' within the meaning of *Curtis Publishing Co. v. Butts,* 388 U.S. 130 . . . and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, . . ."

That determination was, of course, a question of law for the superior court as it is now for this court (Rosenblatt v. Baer (1966) 383 U.S. 75, 88; Rosanova v. Playboy Enter-

prises, Inc., supra, 411 F.Supp. 440, 444; Hotchner v. Castillo-Puche (S.D.N.Y. 1975) 404 F.Supp. 1041, 1045; Walker v. Colorado Springs Sun, Inc. (Colo. 1975) 538 P.2d 450, 459 [cert. den., 423 U.S. 1025].)

From the foregoing uncontroverted evidence and discussion we conclude as a matter of law: (1) that the "demise" of the "City of Paris" and the disposition of its merchandise were matters of legitimate "public interest"; (2) that Vegod, an otherwise private person, voluntarily injected itself into those matters of public interest by its widespread advertising, and its management, of the store's "close out" sale; and (3) that Vegod thereby became a "public figure" within the meaning of *Curtis Publishing Co. v. Butts* and *Gertz v. Robert Welch, Inc.*

Vegod accordingly had the burden of establishing by evidence of convincing clarity that the defendants acted with "actual malice" in respect of the alleged defamatory television news reports. Vegod having conceded an inability to do so, the superior court did not err in entering judgments for the several defendants.

We have found it unnecessary to our disposition of Vegod's appeal to consider the limitation, if any, upon a corporation's right, as distinguished from that of an individual, to recover for wrongful defamation. (Cf. Trans World Accounts, Inc. v. Associated Press, supra, 425 F. Supp. 814, 818.) Nor have we drawn the suggested distinction between the Better Business Bureau of San Francisco's right of free speech, and the other defendants' guaranteed freedom of the press. "[I]t is immaterial whether the words be publicly spoken from the stage or

upon the hustings, or go out to the world through the channels of the printing-press. By the constitutional provision we are about to invoke a citizen may speak, write, or publish his sentiments with equal freedom, . . ." (Dailey v. Superior Court (1896) 112 Cal. 94, 96-97; In re Lyons (1938) 27 Cal.App.2d 293, 299.) And the "Supreme Court of the United States has made it clear that there is little essential difference between freedom of speech as opposed to freedom of press. The two freedoms have been amalgamated in language such as '. . . constitutional limits of free expression . . .' (Pennekamp v. State of Florida, 328 U.S. 331, 335, . . ." (Klahr v. Winterble (Ariz. 1966) 418 P.2d 404, 415.)

The judgments, and each of them, are affirmed.

CERTIFIED FOR PUBLICATION

Elkington, J.

I concur:

Racanelli, P.J.

I dissent.

With all respect to my colleagues, theirs is an unwarranted extension of the rationale of *New York Times v. Sullivan, Curtis* and *Gertz.**

The plaintiff here is a liquidator, not a legislator, and no salutary public purpose is served by conferring so broad an immunity on its alleged detractors.

Nor can I agree that the shadowy extensions expressed in decisions of the lower federal courts justify applying *Sullivan* immunity in mere matters of "public interest." This highly subjective phrase, vague as it is, I take in any event to mean matters which a federal judge at some point in the past had deemed to be of "public interest," i.e., an entertainer consorting with gangsters (Rosanova v. Playboy Enterprises, Inc., 411 F.Supp. 440); an accountant involved in a political campaign (Buchanan v. Associated Press, 398 F.Supp. 1196); an entertainer at a celebrated music festival (Man v. Werner [sic] Bros., Inc., 317 F.Supp. 50).

The press has and ought to have absolute freedom to say what it will of any man, but I would be more cautious in immunizing abuses of such vast powers and removing citizens' rights of redress.

I may say finally that the historicity of the building in which the appellant held its business in my view adds nothing to the alleged public interest in such activity.

---

*New York Times Co. v. Sullivan, 376 U.S. 254; Curtis Publishing Co. v. Butts, 388 U.S. 130; Gertz v. Robert Welch, Inc., 418 U.S. 323.

Ironically, segments of the press and media have long urged that the City of Paris be razed to make way for a new department store.

I would deny the judgments.

Newsom, J.

Trial Court:	Superior Court, City and County of San Francisco
Trial Judge:	Hon. Robert W. Merrill

Attorneys

For Plaintiffs/Appellants:	Hoberg, Finger, Brown, Carlson, Cox & Molligan Peter N. Molligan James Geagan 703 Market St., 18th Floor San Francisco, CA 94103
For Defendants/Respondents American Broadcasting and Lund:	Lillick McHose & Charles Robert Fremlin Robert Kavanaugh Gail Heckemeyer 2 Embarcadero Center, 26th Floor San Francisco, CA 94111
For Defendants/Respondents Better Business Bureau, Thurber and Keefer:	Tolpegin & Imai Andre V. Tolpegin 950 Russ Bldg. 235 Montgomery St. San Francisco, CA 94104

Appendix D

Court of Appeal of the State of California
in and for the
First Appellate District

Division One

No. 42363
Superior Court No. .....

Western Institute of Retailing, Inc., etc., et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., etc., et al.,
Defendants and Respondents.

[Filed Feb. 7, 1979]

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated Feb-7 1979

ELKINGTON, J.
P.J. Acting

Appendix E

Lillick McHose & Charles
Robert Fremlin
Robert Kavanaugh
Stephanie Van Hoorn
Two Embarcadero Center
San Francisco, California 94111
Telephone: (415) 421-4600
Attorneys for Defendants
American Broadcasting Companies, Inc.,
KGO-TV Channel 7 and Christine Lund

Superior Court of the State of California
City and County of San Francisco

No. 652-227

Western Institute of Retailing, Inc., a corporation, and Vegod Corporation, a corporation,
Plaintiffs,
vs.
American Broadcasting Companies, Inc., KGO-TV Channel 7 and Christine Lund, et al.,
Defendants.

[Filed March 22, 1977]

JUDGMENT

On March 15, 1977, this Court granted the motion of defendants American Broadcasting Companies, Inc. (sued in-

correctly as American Broadcasting Company, KGO-TV Channel 7), and Christine Lund under California Code of Civil Procedure section 437c, to enter judgment for said defendants. In accordance with that order,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants American Broadcasting Companies Inc. (sued incorrectly as American Broadcasting Company, KGO-TV Channel 7), and Christine Lund have judgment against plaintiffs Western Institute of Retailing, Inc. and Vegod Corporation, and each of them, and that said defendants recover from plaintiffs their costs of suit in the sum of $4,003.23.

Dated: Mar 22 1977

/s/ Robert W. Merrill

Judge of the Superior Court
Robert W. Merrill

Appendix F

In the Superior Court
of the
State of California

In and For the City and
County of San Francisco

No. 652 227

Western Institute of Retailing, Inc., a corporation, and Vegod Corporation, a corporation,

Plaintiffs,

vs.

American Broadcasting Companies, Inc., KGO-TV Channel 7, Christine Lund, The Better Business Bureau of San Francisco, John Doe Thurber, John Doe Kieffer, et al.,

Defendants.

[Filed Mar. 15, 1977]

JUDGMENT

(In Favor of Defendants Better Business Bureau of San Francisco, Ltd., Charles Thurber, and Louis Keefer)

The above-captioned matter came on regularly before me for Jury Trial on the 8th day of March, 1977; appearing for Plaintiffs Western Institute of Retailing and Vegod Corporation were Messrs: Hoberg, Finger, and Brown, by Peter Molligan and James Geagan; for Defendants American Broadcasting Companies, Inc., a corporation and Christine Lund, Messrs: Lillick, McHose and Charles, by Robert Fremlin and Robert Kavanaugh; and for Defendants Better Business Bureau of San Francisco, Ltd., Louis Keefer, sued and served as John Doe Kiefer and Charles Thurber, sued and served as John Doe Thurber, Messrs: Tolpegin and Imai by Andre V. Tolpegin.

I

The Court thereafter having taken under submission the Motion For Judgment filed by Defendants American Broadcasting Companies, Inc., and Christine Lund, and having read the Memorandum of Points and Authorities and Declarations in support of and in opposition to the said Motion For Judgment; and

II

The Court further having taken Judicial Notice, pursuant to *Evidence Code* §§ 451(f) and 452(g)(h) pursuant to a request by counsel for The Better Business Bureau, Ltd., Charles Thurber and Louis Keefer of the following facts:

1. That the City of Paris Department Store was founded in San Francisco and within the territorial limits of this Court in 1850;

2. That the City of Paris Department Store was in operation on March 10, 1972 within the territorial jurisdiction of this Court;

3. That the possible closing of the City of Paris was reported in the news media; and

4. That the "total sale" of the City of Paris in the month of March, 1972, was a subject of newspaper advertising distributed to the public in the territorial jurisdiction of this Court.

III

That based on the foregoing Motions and requests for Judicial Notice, the Court found, on March 9, 1977 that Plaintiffs Western Institute of Retailing, Inc., and Vegod Corporation, are as a matter of law "public figures" within the meaning of *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) and that said Plaintiffs must therefore prove by clear and convincing evidence "actual malice" by all Defendants as defined in *New York Times Company v. Sullivan,* 376 U.S. 254 (1976); and

IV

The Court having read the following stipulation, entered into by all of the parties to the above-entitled action, to wit as follows:

1. That the Motion for entry of Judgment by Defendants American Broadcasting Companies, Inc., (sued incorrectly as American Broadcasting, KGO-TV Channel 7) and Christine Lund, filed on February 25, 1977, shall be reinstated and deemed a Motion for Summary Judgment pursuant to *California Code of Civil Procedure* § 437(c), that Defendants Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis B. Keefer shall be deemed to have joined in said Motion, and that said Motion is proper in form and is timely.

2. That Plaintiffs Western Institute of Retailing, Inc., and Vegod Corporation are unable to prove that the action of the Defendants and each of them, alleged in the Complaint herein were taken with actual malice within the meaning of *New York Times v. Sullivan,* 376 U.S. 254 (1964); and there being good and sufficient cause shown:

It is hereby ordered, judged and decreed as follows:

That Defendants Better Business Bureau of San Francisco, Ltd., a corporation, Louis Keefer, sued and served as John Doe Kiefer, and Charles R. Thurber, sued and served herein as John Doe Thurber have Judgment against Plaintiffs Western Institute of Retailing, Inc., a corporation and Vegod Corporation, and that said Defendants shall recover all their allowable costs.

Dated:

/s/ Robert W. Merrill
Judge of the Superior Court

Approved as to Form:
Hoberg, Finger & Brown

By: /s/ Peter Molligan
Attorneys for Plaintiff
Western Institute of
Retailing, Inc., and Vegod
Corporation

Dated: 3-14-77

Lillick McHose & Charles

By: /s/ Robert Fremlin
Attorneys for Defendants
American Broadcasting
Companies, Inc., and
Christine Lund

Dated: March 15, 1977

Supreme Court, U. S.
FILED
JUL 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1612

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

vs.

VEGOD CORPORATION,
WESTERN INSTITUTE OF RETAILING, INC.,
Respondents.

Petition for a Writ of Certiorari
to the
Supreme Court of the State of California

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

LILLICK MCHOSE &
CHARLES
ROBERT KAVANAUGH
Two Embarcadero Center
26th Floor
San Francisco, CA 94111
Telephone: (415) 421-4600
Of Counsel

TOLPEGIN, IMAI &
TADLOCK
ANDRE V. TOLPEGIN
235 Montgomery Street,
Suite 950
San Francisco, CA 94104
Telephone: (415) 989-8676
Of Counsel

ROBERT FREMLIN
Two Embarcadero Center
26th Floor
San Francisco, CA 94111
Telephone: (415) 421-4600
Attorney for
Petitioners

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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1. Respondents' Ground for Filing This Supplemental Brief

On April 15, 1980, petitioners American Broadcasting Companies, Inc., Christine Lund, Better Business Bureau of San Francisco, Ltd., Charles R. Thurber and Louis Keefer filed with this Court and served their petition for writ of certiorari to the Supreme Court of the State of California. The underlying action is one for defamation in which the California Supreme Court reversed the trial court and the court of appeal and held that respondent corporations were not public figures. The first question in the petition for writ of certiorari is as follows:

> Did the California Supreme Court err in denying a news broadcaster who reported Better Business Bureau allegations of fraudulent merchandising practices the protection of the actual malice standard of *New York Times Co. v. Sullivan* in a defamation suit where the reason for denying the standard's protection was that "criticism of commercial conduct does not merit the special protection of the actual malice test"?

Petitioners file this supplemental brief pursuant to U.S. Supreme Court Rule 22.6 in order to direct the Court's attention to *Steaks Unlimited, Inc. v. Deaner*, 6 Med. L. Rep. 1129 (U.S.C.A. 3d Cir. 1980), which was decided by the U.S. Court of Appeals for the Third Circuit subsequent to the filing of the petition. The holding in *Steaks Unlimited* cannot be reconciled with that of the California Supreme Court in the case at bar. Hence, a review of this case on writ of certiorari is now appropriate for the additional ground set forth in Supreme Court Rule 17.1(b):

> When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

2. Supplementary Reason for Granting the Writ

The U.S. Court of Appeals for the Third Circuit and the California Supreme Court have decided oppositely the federal question of whether, in a defamation action, criticism of commercial conduct merits the special protection of the actual malice standard of *New York Times Co. v. Sullivan*

Like the case presently before this Court, *Steaks Unlimited, Inc. v. Deaner* is a defamation action arising out of

a televised news report critical of the plaintiff corporation's merchandising practices. Plaintiff Steaks Unlimited, Inc., conducted a four-day sale of meat at several department stores. The meat was United States Department of Agriculture (USDA) inspected, ungraded, frozen, tenderized, boxed beef, approximately equivalent to USDA commercial grade. Defendant Donna Deaner, a reporter and consumer affairs editor for defendant television station WTAE-TV, investigated plaintiff's advertising and sales operations and televised a highly critical report on WTAE's evening news program. Its gist was that consumer's were being misled into believing they were purchasing a better grade of beef at a lower cost per pound.

The United States District Court for the Western District of Pennsylvania granted defendants' motion for summary judgment after first determining that plaintiff Steaks Unlimited, Inc., was a public figure for purposes of its defamation action and, therefore, bore the burden of proving actual malice. *Steaks Unlimited, Inc. v. Deaner*, 468 F. Supp. 779 (W.D. Pa. 1979). On appeal, the U.S. Court of Appeals for the Third Circuit affirmed the judgment and held the district court had not erred in its classification of the plaintiff. In so doing the court of appeals determined specifically that criticism of the commercial conduct of a merchandising corporation merits the protection of the actual malice test:

> In recent years, there has been an increase in consumer interest and awareness. Consumer reporting enables citizens to make better informed purchasing decisions. Whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster the First Amendment goals mentioned above. As the Supreme Court recognized in *New*

York Times, "would be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense having to do so." To the extent this occurs, consumers would be less informed, less able to make effective use of their purchasing power, and generally less satisfied in their choice of goods.

Application of the public figure rule to sellers such as Steaks, which through advertising solicit the public's attention and seek to influence consumer choice, therefore serves the values underlying the First Amendment by insulating consumer reporters and advocates from liability unless they have abused their positions by knowingly or recklessly publishing false information. [6 Med. L. Rep. 1129, 1141-42 (footnote omitted).]

In the case presently before this Court, the subject of the news reports was also misleading merchandising practices. The reports informed the public about the results of a Better Business Bureau investigation which had found exaggerated claims of savings and merchandise of inferior quality. However, the holding of the California Supreme Court was precisely the opposite of the Third Circuit's in the *Steaks Unlimited* case. Rather than holding that consumer reporting should be protected from the "vicissitudes of ordinary civil litigation", the California Supreme Court held that it was inherently unworthy of protection: "[c]riticism of commercial conduct does not merit the special protection of the actual malice test." Thus, a conflict exists on an important federal question, namely, whether criticism of commercial conduct is excluded by virtue of its subject matter from the protection afforded speech by the actual malice standard of *New York Times Co. v. Sullivan.*

3. Conclusion

Steaks Unlimited, Inc. v. Deaner cannot be reconciled with the holding of the California Supreme Court in the present case. Both were defamation actions arising out of criticism of deceptive merchandising practices. The Third Circuit specifically recognized the importance of criticism of commercial conduct and held that defendants were entitled to the protection of the actual malice standard. The California Supreme Court held that defendants were not entitled to the standard's protection on the rationale that consumer reporting is unworthy of protection.

An important federal question is involved and this Court can resolve the conflict by reviewing this case on a writ of certiorari.

Dated: June 27, 1980

Respectfully submitted,

ROBERT FREMLIN
Attorney for
Petitioners

LILLICK MCHOSE &
CHARLES
ROBERT KAVANAUGH
Of Counsel
TOLPEGIN, IMAI &
TADLOCK
ANDRE V. TOLPEGIN
Of Counsel

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PETER N. MOLLIGAN
JAMES GEAGAN
HOBERG, FINGER, BROWN, COX & MOLLIGAN
703 Market Street, 18th Floor
San Francisco, CA 94103
Telephone: (415) 543-9464
Attorneys for Respondents

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7582

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I

STATEMENT OF THE CASE

Plaintiffs and respondents Vegod Corporation (hereinafter "Vegod") and Western Institute of Retailing, Inc., (hereinafter "W.I.R.") commenced an action for defamation against defendants and petitioners American Broadcasting Companies, Inc., American Broadcasting Company KGO-TV Channel 7, Better Business Bureau of San Francisco and certain of petitioners' employees in the Superior Court for the City and County of San Francisco in October of 1972.

At pretrial conferences, the issue arose as to whether Vegod and W.I.R. were "public figures", and thus were required to prove by "clear and convincing evidence" that defendants had acted with "actual malice." The Superior Court found that plaintiffs were "public figures." Plaintiffs conceded that they could not prove "actual malice" within the requirement of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Thereupon the Superior Court entered judgments in favor of the defendants.

Plaintiffs appealed to the Court of Appeal of the State of California, which affirmed the judgments. Plaintiffs thereupon petitioned for a hearing before the Supreme Court of the State of California. A hearing was granted, and that court reversed the judgments.

The courts below assumed certain facts in arriving at their opinions. Respondents objected to certain of these facts as not supported by the record, particularly those intended to describe the nature of the business relationship between respondents and the City of Paris department store. However, for the purposes of this responsive brief, respondents will assume the facts set forth in the Petition as true.

II

THE SUPREME COURT OF CALIFORNIA DID NOT ERR IN HOLDING THAT RESPONDENTS ARE NOT REQUIRED TO PROVE ACTUAL MALICE

1. The Finding that Respondents were Not Public Figures Is In Accord with Recent Decisions of the United States Supreme Court

As the California Supreme Court recognized in the first paragraph of its opinion, there is but one issue before the Court on this appeal: Are respondents "public figures", thus imposing upon them a duty in this defamation action of proving "actual malice" by clear and convincing evidence? (App., p. A-1).

The significance of this issue is the result of a series of decisions enunciated by the United States Supreme Court which have defined and refined the nature and scope of Constitutional privilege in defamation cases.

Since *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), it has been clearly established that "public figures" are forbidden by the Constitution from recovering damages for defamation absent proof that the defendant acted with actual malice in publishing the defamatory material. "Public figures" were defined as persons who are

> intimately involved in the resolution of important public questions or, by reason of their time, shape events in areas of concern to society at large. 388 U.S. at 164, 87 S.Ct. 1996, 19 L.Ed.2d 1116 (Warren, C.J., concurring in result).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the United States Supreme Court reaffirmed the Constitutional significance of the "public figure" test and further defined that term. Justice Powell, speaking for the majority, stated:

> For the most part those who attain [the status of "public figure"] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. 418 U.S. at 345, 94 S.Ct. 3009, 41 L.Ed.2d 808.

By contrast, a private individual is a person who has not "assumed an 'influential role in ordering society' (citation omitted)". *Ibid.*

Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) further defined the term "public figure". That decision also clearly indicated that the term "public controversy" as used in *Gertz* is intended to have a meaning of its own. A public controversy is to be distinguished from matters of general or public interest.

> Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre", it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.* . . . , which concluded that

> the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position . . . [citation omitted]. 424 U.S. at 454, 91 S.Ct. 965, 47 L.Ed.2d 163.

The recent cases of *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) and *Wolston v. Readers Digest Assn., Inc.,* 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979) reaffirmed the "public figure" doctrine of *Gertz* and *Firestone* and provided further guidance in the application of that test. *Hutchinson* made it clear that an otherwise private person cannot be transformed into a public figure by the defamatory falsehoods themselves:

> To the extent the subject of [Hutchinson's] published writings became a matter of controversy it was a consequence of the [alleged defamatory statements]. Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. [citation omitted] 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431.

Hutchinson also pointed out that one of the earmarks of a "public figure" is "regular and continuing access to the media." 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 432.

In *Wolston v. Readers Digest Assn., Inc., supra,* Justice Rehnquist reiterated that the simple fact that the subject of a defamatory falsehood attracts media attention is not conclusive of the public figure issue.

> A private individual is not automatically transformed into a public figure just by becoming involved in or

> associated with a matter that attracts public attention. 443 U.S. at 167, 99 S.Ct. 2708, 61 L.Ed.2d 450.

The *Wolston* court also placed heavy emphasis on the characterization of a public figure as one who engages in purposeful activity to draw attention to himself in an effort to influence the resolution of public issues. *Ibid.*

Thus, the decisions of the United States Supreme Court on the "public figure" issue prescribe a method by which other courts may proceed to determine who does and who does not fall into that category. The threshold question asks whether the claimant is one of that small group of individuals who can be classified as public figures for all purposes. If not, then the court is to analyze the nature of the claimant's activities to determine whether he has "thrust himself or his views into public controversy to influence others." *Hutchinson v. Proxmire,* 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431. A necessary concomitant of this second level of inquiry is whether any "public controversy" exists at all.

In the case at bar, the Supreme Court of California faithfully followed the "public figure" test set down by the United States Supreme Court. Since neither party alleged that the respondents were public figures for all purposes, the opinion proceeded to determine whether respondents had thrown themselves into the vortex of a public controversy. The Court first analyzed the nature and extent of the respondents' involvement with the alleged public issue, the closing of a department store. The California Supreme Court concluded that, assuming *arguendo* that the closing of the store amounted to a public controversy,

the involvement of respondents with that issue was insufficient to support the claim that they had thrown themselves into the vortex of that public question.

> It does not appear that plaintiffs urged City of Paris publicly or otherwise to terminate business or to destroy the "landmark". Merely doing business with parties to a public controversy does not elevate one to public figure status. (App., p. A-7).

This reasoning of the California Supreme Court is in harmony with the United States Supreme Court's analysis in *Hutchinson v. Proxmire, supra.* In that case, Hutchinson had received a government grant to do certain research. Defendant Proxmire publicly characterized Hutchinson's work as worthless and a waste of public funds. In the subsequent suit for defamation, defendant claimed Hutchinson was a public figure based on Hutchinson's successful application for public funds and reports in the newspapers of these grants, and because he had access to the media as evidenced by the fact that his response to defendant's allegations were reported by wire services. The United States Supreme Court disagreed. Justice Rehnquist observed that Hutchinson's activities and public profile were much like countless others in his profession. He had not thrust himself into a public controversy to influence others. Concern about public expenditures is shared by many people. It was not sufficient to make Hutchinson a public figure.

> If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected. 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 411.

The California Supreme Court recognized that if respondents in the case at bar were to be classified as public figures, then a host of private persons who maintained business or contractual dealings with the City of Paris store—employees, suppliers, wholesalers, etc.—would by logical extension also be public figures. The definition of "public figure" would then be reduced to meaninglessness.

The California Supreme Court then proceeded to determine whether a "public controversy" existed in the case at bar. It is undisputed that respondents were involved in the public sale of goods and merchandise. The Court analyzed whether the quality and availability of goods for sale in these circumstances was an issue that achieved the restrictive status of "public controversy". Justice Clark, writing for the majority, concluded in the negative. Criticism of commercial conduct, the Court stated, does not meet the "public controversy" standard necessary before the actual malice standard will be invoked.

> Balancing one individual's limited First Amendment interest against another's reputation interest (*Herbert v. Lando* (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur. (App., p. A-8).

Once again, the case of *Hutchinson v. Proxmire, supra,* demonstrates the correctness of the California Supreme Court's analysis in the case at bar. In *Hutchinson,* the public question involved was the manner in which federal

government funds were being expended. The issue had been raised on the floor of the United States Senate. Surely this public question must be considered a matter of greater public concern than the quality of goods being sold at a department store. Yet the United States Supreme Court held that the issue in *Hutchinson*, while a matter of public concern, did not amount to a "public controversy" within the meaning of *Gertz* and its progeny. 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431. If the public issue in *Hutchinson* did not achieve that status, it is difficult to perceive how the sale of goods issue in the case at bar could be categorized as a "public controversy."

While the California Supreme Court did not so note in its decision, there is an additional rationale supporting its finding that respondents were not public figures. The record is barren of any evidence that there had been any public discussion whatsoever of the quality of respondents' goods prior to the allegedly defamatory broadcasts. Therefore, if this question ever did become a public issue, it became one solely as a result of the broadcasts themselves. A defendant cannot fashion for himself a privilege simply by widely disseminating the defamatory statements. *Hutchinson v. Proxmire*, 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431. Further, there is no evidence that respondents had available "regular and continuing access to the media", affording them an opportunity to respond to the defamatory broadcasts. *Ibid.*

2. There Is No Rule In Law or Reason Compelling a Distinction Between Corporations and Natural Persons on the "Public Figure" Issue

Petitioners urge that a different standard should be applied to corporate plaintiffs in defamation cases and that they should be required to prove actual malice even if they are not public figures. This argument was made to the California Supreme Court and persuasively rejected. Petitioners are able to cite but one authority seeming to propose such a distinction, *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F.Supp. 947 (D.D.C. 1976). No other reported case known to respondents has followed this anomolous holding, which must be regarded as dictum inasmuch as that court also held that the plaintiffs were public figures. 417 F.Supp. at 956. The California Supreme Court pointed out that in California a corporation's right and redress against defamation is well established (App., p. A-9). California law draws no distinction between the rights of natural persons and corporations in such actions. *Di Giorgio Fruit Corp. v. American Federation of Labor,* 215 Cal.App.2d 560, 570-571, 30 Cal.Rptr. 350, 355-356 (1963).

Moreover, there is no logical reason to draw such a distinction.

> While it is true that the Supreme Court's opinions in [defamation] cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the

other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defamation claims, the distinction between corporations and individuals is one without a difference. *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814, 819 (N.D.Cal. 1977).

3. Petitioners were Not Denied Due Process of Law Under the Fourteenth Amendment

Petitioners argue that they were denied due process of law because the California Supreme Court did not consider whether the California Constitution requires an affirmance of the trial court's opinion. However, petitioners cite no case law which in any way demonstrates that the California Constitution does compel a finding that respondents in these circumstances must prove actual malice within the meaning of *New York Times v. Sullivan, supra.* By virtue of plaintiff's stipulation (App., pp. A-12-13), the question of the relevance of the California Constitution to the issues in this appeal was not brought before the California Supreme Court. (App., p. A-8). As petitioners admit, they argued for affirmance of the trial court opinion on California Constitutional grounds in the lower courts. The California Supreme Court, which must be presumed to be familiar with its state constitution, nevertheless reversed the trial court judgment.

III

CONCLUSION

The California Supreme Court faithfully adhered to the "public figure" test enunciated by the United States Supreme Court in *Gertz v. Robert Welch, Inc., supra*, and its progeny, in arriving at its opinion below. Its holding that respondents are not "public figures" is compelled by those decisions.

Respondents respectfully request that the Petition For A Writ of Certiorari be denied.

Dated: July 3, 1980

Respectfully submitted,

PETER N. MOLLIGAN
JAMES GEAGAN
Attorneys for Respondents

(Appendix follows)

Appendix A

In the Supreme Court
of the
State of California

S.F. 23999
Super. Ct. 652-227

Vegod Corporation et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., et al.,
Defendants and Respondents.

[Filed Nov. 29, 1979]

SEE DISSENTING OPINION

In this defamation action the trial court ruled that plaintiffs are "public figures" within the meaning of Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 and that actual malice is an essential element of plaintiffs' cause of action. Plaintiffs conceded they are unable to prove defendants acted with actual malice within the holding of New York Times v. Sullivan (1964) 376 U.S. 254. Judgment was granted defendants, and plaintiffs appeal. We reverse.

Plaintiff corporations are engaged in closing out stores that have failed or are going out of business. Plaintiffs arranged to conduct a "closing out sale" for the City of Paris, a respected San Francisco department store, opened in 1850 and described by the trial court as a "landmark

store." When the store's end appeared imminent in 1972, it was widely reported by the news media. Bargains were widely advertised. Plaintiffs also rented space to concessionaires who brought in outside merchandise according to their own practices and procedures.

A Better Business Bureau spokesman advised a KGO-TV news reporter that plaintiffs were selling inferior merchandise at inflated prices. KGO-TV notified plaintiffs of its intention to broadcast the story. One broadcast stated: "The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the close-out campaign. The watchdog agency says two outside companies, Vega [*sic*] Corporation and Western Institute of Retailers [*sic*], have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all."

In New York Times v. Sullivan, *supra*, 376 U.S. 254, 269 et seq., the Supreme Court determined that public officials may not recover damages for defamation unless they show defendant acted with actual malice. While recognizing the First Amendment does not protect libelous statements, the court reasoned that erroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable

self-censorship. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." (376 U.S. at p. 279.) The court defined "actual malice" as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at pp. 279-280.)

Three years later in Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155, the court held that public figures —like public officials—must prove actual malice to recover for defamation. Although the court did not give us an encompassing definition of public figure, it held the plaintiffs in the two cases before it met the public figure test. In one, the plaintiff was an athletic director of a state university who was employed by a private corporation rather than the state. The libelous statement was a report covering an alleged conversation between him and a coach of another university and the ensuing football game between the two universities. Plaintiff in the second was a retired Army officer who had "thrust himself into the 'vortex' of the controversy" over admission of a black to a state university, and the libelous statement related to his conduct with respect to a riot at the university. (388 U.S. at pp. 140-142, 146.)

The Supreme Court again sought to strike a balance between vindication of honor through defamation law on one side and free speech and press protected by the First Amendment on the other in Gertz v. Robert Welch, Inc., *supra,* 418 U.S. 323. The court recognized that, while false statements of fact enjoy no constitutional protection, per-

mitting strict liability for false statement impairs First Amendment liberties by deterring speech that matters. The court also recognized the state has a legitimate interest in protecting reputation. The court defined public figures: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (*Id.*, at p. 351.)

Distinguishing between private and public figure the court reasoned that public figures ordinarily will have significantly greater access to the media to contradict lie and error than will private individuals, and that those classed as public have voluntarily thrust themselves to the fore, inviting attention and comment and exposing themselves to increased risk of defamatory falsehood. Private persons by contrast have not undertaken an " 'influential role in ordering society.' " (418 U.S. at pp. 344-345.)

Gertz was an attorney employed to bring a wrongful death action by the family of a person killed by a police officer convicted of second degree murder. The alleged libelous article asserted that the conviction was a frameup, part of a Communist conspiracy, and it claimed that Gertz had Communist connections.

Recognizing that Gertz had been active in community and professional affairs, the court stated: "We would not lightly assume that a citizen's participation in community

and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

"In this context it is plain that petitioner was not a public figure. He played a minimum role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation." (418 U.S. at p. 352.)

Although private persons are not necessarily required to prove actual malice to recover for defamation, states may not impose liability without fault. In such cases, the state may determine the fault standard to apply. (418 U.S. at p. 347.)

In Time Inc. v. Firestone (1976) 424 U.S. 448, the court again considered the meaning of the term "public figure." Time magazine erroneously reported that a divorce

was granted to Mr. Firestone on grounds of extreme cruelty and adultery. Time argued that Mrs. Firestone was a "public figure" since the 17-month trial attracted national attention, eliciting 88 articles in Miami and Palm Beach newspapers. Mrs. Firestone had also given several press conferences and was a prominent member of Palm Beach society.

Rejecting Time's argument the court stated: "[P]etitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position, stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 U.S., at 346, 94 S.Ct., at 3010 [¶] Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz,* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense

than that of the defendant called upon to defend his interests in court." (*Boddie v. Connecticut,* 401 U.S. 371, 376-377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971). Her actions, both in instituting the litigation and in its conduct were quite different from those of General Walker in *Curtis Publishing Co., supra.* She assumed no 'special prominence in the resolution of public questions.' *Gertz, supra,* 418 U.S., at 351, 94 S.Ct., at 3013. We hold respondent was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce." (424 U.S. at pp. 454-455; fn. omitted.)

Defendants argue that the demise and closing out sale of the City of Paris were matters of public controversy because it was a "landmark store." Even assuming the venerable store's planned destruction created a public controversy, those conducting the subsequent close-out sale cannot be said to have thrown themselves into the vortex of that controversy. It does not appear that plaintiffs urged City of Paris publicly or otherwise to terminate business or to destroy the "landmark." Merely doing business with parties to a public controversy does not elevate one to public figure status.

Defendants also urge that by selling goods to the public and by advertising the sale plaintiffs became public figures. In *Gertz* the court in concluding that he was not a public figure pointed out that Mr. Gertz had never discussed the civil or criminal litigation with the press. In *Firestone* the court pointed out that Mrs. Firestone did not seek publicity on the propriety of her marital conduct.

While availability of goods for sale and their quality are matters of public interest, this is not the test. The public interest test was expressly rejected in *Gertz* (418 U.S. at p. 346), and in *Firestone* (424 U.S. at pp. 455-456), in favor of the public controversy test. (See also Hutchinson v. Proxmire (1979) 47 U.S.L. Week 4827, 4833-4834.)

Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (Herbert v. Lando (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.[1]

Pointing out that *Gertz* and *Firestone* relied on individual interests in reputation, one federal district court has held that in defamation actions corporations must prove malice in fact whenever the defamatory statement relates to a matter of public interest. (Martin Marietta Corp. v. Evening Star Newspaper (D.C. 1976) 417 F.2d 947, 954-956.) However, two other federal district courts have rejected the proposed distinction. (Reliance Insurance Co. v. Barron's (S.D.N.Y. 1977) 442 F.Supp. 1341, 1347-1348; Trans World Accounts, Inc. v. Associated Press (N.D. Cal. 1977) 425 F.Supp. 814, 819.)

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[1]Because plaintiffs' stipulation related to the First Amendment privilege under New York Times v. Sullivan, *supra*, 376 U.S. 254, we consider only that federal privilege and do not express any view as to whether the statements were priviliged under California law.

In California, a corporation's right and redress against defamation is well established. (DiGiorgio Fruit Corp. v. American Federation of Labor (1963) 215 Cal.App.2d 560; Daniels v. Sanitarium Assoc., Inc. (1963) 59 Cal.2d 602, 609; Hotel and Restaurant Employees Union v. Anaheim Operating, Inc. (1978) 82 Cal.App.3d 737, 752; Triton Insurance Underwriters, Inc. v. Mutual Chiropractic Insurance Co. (1965) 232 Cal.App.2d 829, 832; see also, Civ. Code, § 45; Rest.2d Torts, § 561.)

Rejecting the distinction between individuals and corporations in *Martin Marietta*, the court in Trans World Accounts, Inc. v. Associated Press, *supra*, 425 F. Supp. 814, 819, reasoned: "[A]t least in this case governed by California substantive law, there is no distinction between the protectible interest in reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages. (*DiGiorgio Fruit Corp. v. American Federation of Labor*, 215 Cal. App.2d 560, 30 Cal.Rptr. 350, 355-356 (1963); compare Martin Marietta Corp. v. Evening Star, above, at 955. [¶] While it is true that the Supreme Court's opinions in these cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defama-

tion claims, the distinction between corporations and individuals is one without a difference."

The judgment is reversed.

CLARK, J.

WE CONCUR:
TOBRINER, J.
MOSK, J.
RICHARDSON, J.
MANUEL, J.

Vegod v. American Broadcasting Companies, Inc.
S.F. 23999

DISSENTING OPINION BY NEWMAN, J.

Citing New York Times v. Sullivan, 376 U.S. at 269 et seq., the majority opinion concludes (*ante* p. 3): "[E]rroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable self-censorship."

The California Constitution ensures that those words apply here. Article I, § 2 commands that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

Was there an abuse of that right here? The majority so conclude, arguing (1) that the facts show no public controversy, and (2) that plaintiffs had not attained "public figure status". I disagree. I think it is clear that inner-city "close-out sales" in our era do inspire controversial concerns; and the "landmark" character of the building here merely helped to publicize those concerns and make them more newsworthy. Plaintiffs indeed did decide to thrust themselves into the vortex of that controversy, whether or not they already had become public figures.

NEWMAN, J.

I Concur:
BIRD, C.J.

Hoberg, Finger & Brown
Peter N. Molligan, Esq.
703 Market Street
Central Tower, 18th Floor
San Francisco, California 94103
Telephone: (415) 543-9464
Attorneys for Plaintiffs

No. 652 227

In the Superior Court of the State of California,
In and for the City and County of San Francisco

Western Institute of Retailing, Inc., and Vegod Corporation,
Plaintiffs,

vs.

American Broadcasting Companies, Inc., et al.,
Defendants.

[Filed Mar. 10, 1977]

Stipulation Regarding Defendants' Motion for Summary Judgment

The plaintiffs in the above-entitled action stipulate as follows:

That the "Motion for Entry of Judgment for Defendants American Broadcasting Companies, Inc., KGO-TV Channel 7 and Christine Lund" filed with the above-entitled Court on February 25, 1977, may be heard by the Court on

March 10, 1977, as a Motion for Summary Judgment pursuant to California Code of Civil Procedure § 437(c); that any and all procedural or formal defects in said motion are hereby waived; and that defendants Better Business Bureau of San Francisco, Ltd., Charles Thurber, and Louis Keefer may join as moving parties in said motion.

That, following briefs and oral argument, the Court, on March 9, 1977, entered its ruling that plaintiffs Western Institute of Retailing, Inc. and Vegod Corporation are, as a matter of law, "public figures" within the meaning of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that they must, therefore, prove by clear and convincing evidence "actual malice" as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That whereas said plaintiffs can at trial prove all the elements necessary for a verdict on their behalf under California state law, including "malice" within the meaning of California Civil Code § 47 (3), *Sanborn v. Chronicle Pub. Co.*, 18 C. 3d 406 (1976), and all other cases construing that statute if that privilege is found to be applicable to defendants, plaintiffs are unable to prove "actual malice" by "clear and convincing evidence" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Dated: March 10, 1977

HOBERG, FINGER & BROWN

By: /s/ Peter N. Molligan
Peter N. Molligan
Attorneys for Plaintiffs

Supreme Court, U. S.
FILED
AUG 26 1980
MICHAEL RODAK, JR., CLERK

79-
No. 1612

In the Supreme Court

OF THE

United States

OCTOBER TERM 1979

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,

VS.

VEGOD CORPORATION,
WESTERN INSTITUTE OF RETAILING, INC.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

LILLICK MCHOSE & CHARLES
ROBERT KAVANAUGH
Two Embarcadero Center
26th Floor
San Francisco, CA 94111
Telephone: (415) 421-4600
Of Counsel

ROBERT FREMLIN
Two Embarcadero Center
26th Floor
San Francisco, CA 94111
Telephone: (415) 421-4600
Attorney for Petitioners

TOLPEGIN, IMAI & TADLOCK
ANDRE V. TOLPEGIN
235 Montgomery Street
Suite 950
San Francisco, CA 94104
Telephone: (415) 989-8676
Of Counsel

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

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No. 1612

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Petition for a Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

Unlike the trial court and the court of appeal, the California Supreme Court held that respondent merchandising corporations were not required to prove actual malice. Respondents attempt to defend that decision by arguing the result reached is consonant with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Their argument is misleading: The California Supreme Court did not apply *Gertz* but, on the contrary, rejected it. The Court's holding was that the

Gertz test for determining who is a public figure (and, therefore, who must prove actual malice) has no application to any communications about matters of interest to consumers:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. (Petition App., p. A-8)

Not only does *Gertz* promulgate a different test for application of the actual malice standard, it specifically rejects subject matter tests of the kind applied by the California Supreme Court. Such tests, according to this Court, inevitably require courts to determine "what information is relevant to self-government". 418 U.S. at 346. *Accord, Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976). The danger inherent in requiring courts to make this determination is apparent here where the California Supreme Court found unworthy of protection a type of information other courts consider of high societal value. For example, in *Steaks Unlimited, Inc. v. Deaner,* 6 Med. L. Rptr. 1129 (U.S.C.A. 3d Cir. 1980), the United States Court of Appeals specifically recognized the importance of the actual malice standard in protecting precisely the same type of information.

The primary issue before this Court, therefore, is whether the California Supreme Court committed federal constitutional error in refusing to follow *Gertz* and in applying a proscribed subject matter test that excludes from the protection of the actual malice standard all information about the value and safety of goods and services.

With respect to the second issue raised in the petition for certiorari, respondent corporations assert that "there is

no logical reason" to distinguish between corporations and natural persons in determining application of the actual malice standard. (Resp. Brief, p. 10) Federal district courts have found the question more difficult. One federal court has made the distinction (*Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 155-56 (D.D.C. 1976)) and two have not. *Reliance Insurance v. Barron's*, 442 F. Supp. 1341 (S.D.N.Y. 1977); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977). Thus a conflict exists over whether the distinction should be made and only this Court can resolve it.

With respect to the third issue raised in the petition, respondents state that "petitioners cite no case law which in any way demonstrates that the California constitution does compel a finding that respondents in these circumstances must prove actual malice within the meaning of *New York Times v. Sullivan, supra.*" (Resp. Brief, p. 11) Respondents' statement misses the point. Petitioners do not contend that the issue was wrongly decided but that they were denied due process when the California Supreme Court refused to decide. That the underlying California constitutional law issue is not frivolous is established by the fact that the dissenting judges of the California Supreme Court reached the issue and determined that the state constitution does require respondents to prove actual malice.

Respondents' brief sidesteps the issues in the pending petition for certiorari. Contrary to the impression respondents seek to create, the issues are of fundamental constitutional significance. What is at stake in their resolution

is the extent to which media can inform consumers of dangerous and misrepresented products and services. Petitioners respectfully request that their petition be granted.

Dated: August 22, 1980.

Respectfully submitted,

ROBERT FREMLIN

Attorney for Petitioners

LILLICK MCHOSE & CHARLES
ROBERT KAVANAUGH
Of Counsel

TOLPEGIN, IMAI & TADLOCK
ANDRE V. TOLPEGIN
Of Counsel

MOTION FILED
JUL 16 1980

No. 79-1612

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

AMERICAN BROADCASTING
COMPANIES, INC., et al.,
Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND BRIEF OF AMICUS CURIAE

KATHLEEN E. DOYLE
1020 N Street, Rm. A-602
Sacramento, CA 95814
(916) 445-5126

Attorney for Richard B. Spohn, Director of the Department of Consumer Affairs of the State of California

RICHARD A. ELBRECHT
A. PAUL GRIEBEL
ROGER E. DICKINSON
LAURA W. KAPLAN
DOROTHY M. JONES
Department of Consumer Affairs
Division of Consumer Services
Legal Services Unit, Rm. A-602
1020 N Street
Sacramento, CA 95814
(916) 445-5126

Of Counsel

QUESTIONS PRESENTED

1. Whether the decision of the California Supreme Court in Vegod Corporation, et al. v. American Broadcasting Companies, Inc., et al., 25 Cal.3d 763 (1979) is in accord with applicable United States Supreme Court decisions. The court first denied protection of the actual malice test to consumer protective criticism and reporting as a category of speech, and then included this consideration in its balancing process to determine whether or not a libel plaintiff was a public figure.

2. Whether a business entity which has widely advertised its wares in the marketplace to the public is a public figure for the limited purpose of consumer advocacy, criticism and reporting.

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MOTION TO FILE BRIEF AS AMICUS CURIAE

Richard B. Spohn, Director of the California Department of Consumer Affairs, respectfully moves for leave to file the attached Brief Amicus Curiae in this case, pursuant to Rule 42. The interest of the California Department of Consumer Affairs arises from the fact that it is the state agency mandated to protect and advance the interests of the citizens of the State of California as consumers. See California Business and Professions Code Section 320. The California Supreme Court has ruled in Vegod Corporation, et al. v. American Broadcasting Company Inc., 25 Cal.3d 763, (1979) that criticism of business practices is not entitled to the protection of the actual malice standard set by this court in New York Times v. Sullivan 376 U.S. 254 (1964). The standard was designed to prevent chilling of speech and self censorship by the press due to the threat of libel litigation. The California Supreme Court has definitively

determined that criticism of business practices does not require or merit the protection of this higher standard of proof.

The California Supreme Court also has ruled that a business entity which has made substantial use of the media to advertise a sale in the name of a well known department store and which had clearly thrust its activities into the public arena in the marketplace of goods and services is not a public figure for the purpose of a defamation action arising out of consumer protective criticism of the business practices in the sale. The libel action arose out of the reporting of this criticism to the public. Such media reporting presents the only way in which the consuming public can receive information other than those statements made by the business in media advertising campaigns such as the one conducted for the City of Paris' sale. Information about the marketplace and the actors in the marketplace from other than those who are advertising their wares and acting in economic self interest is critical to the

consuming public as well as to the proper functioning of our economy. Consumers must have such information in order to make informed decisions. The result of the holding of the California Supreme Court can only be a chilling of that form of speech known as consumer advocacy and reporting.

Since fearless consumer reporting and criticism is a major element of any program to inform and protect consumers from dangerous products and unlawful business practices, the interests of California's consumers, whose interests Amicus Curiae is mandated to protect, are clearly adversely affected by the ruling of the California Supreme Court.

Because Amicus Curiae is specifically mandated to represent the consumer interest, it is believed that the brief which Amicus Curiae is requesting permission to file will contain a more complete argument on the question of the need for the actual malice standard in order to prevent the

chilling of consumer reporting and consumer criticism of business practices.

DATED: July 10, 1980.

Respectfully submitted,

Kathleen E. Doyle

KATHLEEN E. DOYLE
Staff Counsel

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1612

AMERICAN BROADCASTING
COMPANIES, INC., et al.
Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUMMARY OF ARGUMENT

Amicus Curiae supports the Petition for Certiorari filed by American Broadcasting Company and the Better Business Bureau. Amicus argues that consumer advocacy and reporting is a very important form of speech, and that the holding of the California Supreme Court improperly considers the importance of that category of speech, apart from its allegedly libelous content, in determining the applicability of the actual malice standard. In so doing, the California Supreme Court decision is not in accord with the controlling cases of this Court. Amicus also supports Petitioner's assertion that there is a conflict in the decision of the California Court and the Third Circuit Court of Appeals which raises an important federal question.

ARGUMENT

I

INTEREST OF AMICUS

The interest of Amicus is fully set forth in his Motion to file this brief as Amicus Curiae.

II

THE CALIFORNIA DECISION IS NOT IN ACCORD WITH DECISIONS OF THIS COURT INSOFAR AS IT FIRST DETERMINED THAT MEDIA REPORTING OF CONSUMER ADVOCATES' CRITICISM OF BUSINESS PRACTICES IS CATEGORICALLY NOT ENTITLED TO THE PROTECTION OF THE ACTUAL MALICE TEST AND THEN CONSIDERED THIS FACTOR IN ITS BALANCING PROCESS TO DETERMINE WHETHER THE STANDARD WOULD APPLY.

The California Supreme Court has ruled that criticism of business practices is categorically not entitled to the protection of the actual malice test. The Court held in Vegod Corporation, et al. v. American Broadcasting Companies, Inc., et al., supra, as follows at page 770:

> "Criticism of commercial conduct does not deserve the protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (Herbert v. Lando (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur."

The first sentence of the Court's ruling is supported by no authority. It is also an improper consideration when a court applies the balancing test to reach the Court's conclusion.

The criticism of the City of Paris sale which formed the basis of the libel complaint of Vegod Corporation represented an effort by a responsible consumer protection agency, the Better Business Bureau, and the American Broadcasting Company, to perform a public service by providing consumers with a source of information other than the media advertisements of Vegod Corporation regarding

the City of Paris sale. The noncommercial communication of such information from third parties such as the Better Business Bureau about products and business practices is crucial for a consuming public which is subject to a barrage of advertising messages communicating a glittering array of proposed commercial transactions.

Consumer advocacy and criticism of business practices which takes the form of an informational service is performed by public-spirited organizations such as the Better Business Bureau and is communicated to the public through the media. Such speech is motivated by a concern that consumers enter the marketplace with as much information as possible. In a different context, the Court has stressed the value of such information both to the individual consumer and to the economy as a whole. See Virginia Board of Pharmacy v. Virginia Citizens Consumer's Council, Inc., 425 U.S. 748 at 764-765 (1976) and Central

Hudson Gas and Electric Company v. Public Service Commission of New York No. 79-565 48 L.W. 4783 (1980). Because the speakers or advocates are not motivated by economic self interest, such speech is not hardy and can be as easily and effectively chilled by the threat of libel litigation as unpopular political speech. The constitutional considerations stemming from concern about self censorship which caused this Court to rule in New York Times v. Sullivan, supra, that the actual malice standard of proof was essential in order to prevent the chilling of unpopular criticism of public officials, apply with equal force to speech which criticizes business practices. Such speech can be easily distinguished from the advertising at issue in such cases as Central Hudson Gas and Electric Company v. Public Service Commission of New York, supra. Consumer advocacy and reporting is not "commercial speech" and is a more than appropriate subject for protection of the actual malice standard.

In any event, the ruling of the California Supreme Court is not in accord with this Court's previous decisions; it includes as a factor in the balancing process between First Amendment interests and reputation interests, its exclusion of consumer protective criticism of business activities and the media reporting of same from the protection of the actual malice test.

The inclusion of such a consideration in making the determination that Vegod was not part of a public controversy or a public figure is not in accord with the decision of this court in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In that case, this Court held that the applicability of the actual malice standard turns on the public figure status of the plaintiff. In no case has a wholesale denial of protection to an entire category of fully protected speech played a role in determining whether plaintiff was a public figure.

this Court has specifically refused to consider the content of speech in determining the applicability of the standard. This Court stated in Time, Inc. v. Firestone, 424 U.S. 449 (1976) at 456 as follows:

> "Whatever their general validity, use of such subject matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in the area."

The categorical statement that criticism of business practices does not "deserve" the protection of the actual malice test has no place in the analysis. The California decision, Amicus Curiae submits, is also not in accord with the Court's decisions attaching great importance to communications which inform consumers even when they take the form of commercial speech. Virginia Board of Pharmacy v. Virginia Citizens Consumers Council, Inc., supra.

However, the decision is clearly not in accord with this Court's decisions in which First Amendment interests have been balanced against the interests in reputation. In

weighing in that balance its initial wholesale withdrawal of the entire subject matter of consumer protective criticism and reporting from actual malice protection, the California Court has strayed far from the line of cases beginning with New York Times v. Sullivan, supra.

III

IN CONDUCTING ITS BUSINESS IN THE WELL-KNOWN NAME OF THE CITY OF PARIS, AND IN OFFERING ITS WARES IN THE MARKETPLACE, VEGOD CORPORATION VOLUNTARILY ENTERED THE PUBLIC ARENA AND BECAME A PUBLIC FIGURE FOR THE LIMITED PURPOSE OF CONSUMER PROTECTIVE CRITICISM OF ITS BUSINESS PRACTICES.

In Gertz v. Robert Welch, Inc. supra, this Court defined some general principles to be followed in distinguishing among libel plaintiffs for the purpose of determining to which the actual malice standard of proof would apply. Justice Powell, writing for the Court, first observed that those libel plaintiffs with access to the media, or those who could make use of available opportunities

to correct an error and minimize its adverse impact on reputation, would be more likely to be classified as public figures. The second and more important consideration underlying the distinction between public and private defamation plaintiffs was the fairness of a rule which required those who seek public office or who thrust themselves into the public arena to bear the consequences of the attention and comment which such plaintiffs have inevitably invited by their own conduct. Id. at pages 344-345. As Justice Powell noted at page 345:

> "Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

The language of the rules defined in Gertz, a case in which the plaintiff was a natural person, more easily lend themselves to application to natural persons than they do to a corporate plaintiff such as Vegod.

Yet when these rules are properly applied it is difficult to avoid the conclusion that Vegod did indeed thrust itself into the public arena through its widely advertised sale and the operation of its business through the well-known City of Paris name. While it may be true that few had heard of Vegod prior to the television broadcast, all had heard of the City of Paris. In doing business with the public through the City of Paris name, Vegod accepted the consequences, both the benefits and the burdens, of selling in the name of a well-known and advertised business entity. Furthermore, even if Vegod Corporation had simply advertised the sale in its own name, having done so, Vegod would have thrust itself into the public arena and the public eye for the limited purpose of criticism of its business activities and products. Certainly, for the limited purpose of consumer criticism and reporting, Vegod voluntarily transmuted its otherwise private character into a public one. Any

business which advertises and places its wares in the open market exposes itself to the risk of a consumer reporter's critique of its practices and wares for the purpose of informing the consuming public.

In Steaks Unlimited, Inc. v. Donna Deaner and WTAE-TV 4 and Hearst Corporation (C.A. No. 77-0803, 3d Cir., April 24, 1980), the Third Circuit Court of Appeals was recently called upon to rule on the public figure status of a business entity in a case with facts remarkably similar to those of the case at bar. The Court determined that through its intensive media campaign, the business plaintiff in that case had invited public attention, comment and criticism. (Slip Op. pages 16 and 17). The Court also considered the fact that Steaks Unlimited, Inc., possessed regular and continuing access to the channels of communication through its normal advertising activities. The

Court held as follows:

> "Accordingly, we hold that the District Court did not err in concluding that Steaks, by reason of its intensive advertising campaign and its continuing access to channels of communication, is a public figure with respect to the controversy surrounding the Deaner report. (Slip Op. at page 18)

The Court ruled that Steaks was a limited purpose public figure for the purpose of consumer criticism, reporting and advocacy. While this court has not had occasion to rule on the question, Amicus Curiae submits that the reasoning of the Third Circuit Court of Appeals results in a proper balance between the interest of a business entity libel plaintiff in its reputation, and the interest of the public in a free press and in access to consumer informational criticism from consumer protection agencies. Such speech is designed to protect consumers from the business practices of those who engage in widespread advertising or in wide dissemination of their product in the marketplace. The

California decision is in conflict with that of a Federal Circuit Court of Appeals. The petition should be granted to resolve this conflict on a very important question of federal law.

CONCLUSION

The California Supreme Court's decision is not in accord with the decisions of this Court as to the factors which may be properly considered in determining whether or not the actual malice standard applies. The California decision is also in conflict with the decision of the Third Circuit Court of Appeals as to an important federal question which affects all consumers. Amicus Curiae respectfully submits that the Petition for Certiorari should be granted. Certainly, in light of the fundamental error in reasoning referred to above, Amicus Curiae respectfully submits that the decision of the California Supreme Court should at least be vacated and the case remanded to permit the California Court to reconsider its decision. Amicus

suggests this particularly in view of this Court's very recent decision in Central Hudson Gas and Electric v. Public Service Commission of New York, supra.

DATED: July 10, 1980.

Respectfully submitted,

KATHLEEN E. DOYLE
Department of Consumer Affairs
Division of Consumer Services
Legal Services Unit, Rm. A-602
1020 N Street
Sacramento, CA 95814
(916) 445-5126

MOTION FILED
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC. *et. al.*

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

MOTION OF NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF CALIFORNIA and BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS

STEPHEN E. NEVAS
National Association
of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 293-3560
Of Counsel

ERWIN G. KRASNOW
National Association
of Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036
Telephone: (202) 293-3560
Attorney for Amicus
NATIONAL ASSOCIATION
OF BROADCASTERS

THE CASILLAS PRESS, INC.–1717 K Street N. W.–Washington, D. C.–223-1220

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IN THE

Supreme Court of the United States

October Term, 1979

No.

AMERICAN BROADCASTING COMPANIES, INC. *et. al.*

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

MOTION OF NATIONAL ASSOCIATION OF BROADCASTERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF CALIFORNIA

The National Association of Broadcasters ("NAB") hereby respectfully moves for leave to file the attached brief as amicus curiae in support of the petition in this case for a writ of *certiorari* to the Supreme Court of California. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent has been requested and has been refused.

NAB is the principal trade association for the broadcast industry. Its membership includes 4,653 radio stations and 650 television stations located in all 50 states and in United

States possessions. NAB's public service activities include, most notably, development of the Code of Practice, which is the basis for the industry's voluntary self-regulation.

NAB has a staff of over 100 employees and provides a full range of services to its members including engineering, managerial and programming assistance. It serves as a clearinghouse for minorities seeking jobs in the industry and is developing a "matching grant" program to assist minorities in acquiring ownership of broadcast stations. Amicus NAB is the principal industry spokesman to Congress and to the Federal Communications Commission. It also keeps its members and the industry as a whole advised of legal developments affecting broadcasting.

NAB seeks to file a brief as amicus curiae to apprise this Court of the extent to which the decision of the California Supreme Court departs from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and from the case law developed throughout the United States pursuant to *Gertz*. Petitioners have not cited authorities demonstrating the magnitude of California's divergence from *Gertz* and its progeny. NAB also wishes to apprise this Court of the extent to which the decision below will impede broadcasters in discharging their obligations to inform the public about questionable merchandising techniques and products.

April 18, 1980

Respectfully submitted,

By _____
ERWIN G. KRASNOW
Attorney for National
Association of Broadcasters

Stephen Nevas
Of Counsel

IN THE

Supreme Court of the United States

October Term, 1979

No.

AMERICAN BROADCASTING COMPANIES, INC. *et. al.*

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI to the SUPREME COURT OF THE STATE OF CALIFORNIA

Because the members of the NAB are licensees of the public airwaves, they have a statutory obligation to broadcast programming that meets the "public interest, convenience and necessity". 47 U.S.C. § 307. This imposes upon them a duty to provide such programming as news, public affairs, public participation and editorials. NAB members have long recognized that, if they are truly serving the public interest, their programming may often be controversial and even provocative. Presently, however, there is increasing concern among NAB members over the growth in defamation suits against broadcasters. The cost of defending these suits is intimidating to broadcasters and can be crushing. The obvious and natural effect of expensive defamation litigation is to dampen the ardor of broad-

casters for providing the strong public affairs programming that the public needs and deserves.

Amicus NAB and its members are keenly interested in the disposition of this case because it will impact directly on the quantity and seriousness of defamation actions they will face and, therefore, on the extent to which they can offer one of their most important types of programming, namely, consumer affairs reporting. If the California Supreme Court's decision remains precendent, the ability of broadcasters to program consumer affairs reporting will be severely impaired.

The reports in issue are classic examples of consumer affairs reporting. According to the opinion of the California Supreme Court, petitioner broadcasters informed the public of the results of an independent investigation conducted at a highly respected, 122-year-old department store. The reports warned the public to exercise care while shopping at the store's closeout sale because the Better Business Bureau had found both merchandise of inferior quality and claims of savings that were highly misleading. The reports were especially valuable to the public because, once the store closed its doors, dissatisfied purchasers would be left without an effective remedy.

Notwithstanding the importance to consumers of the news reports in issue, the California Supreme Court's holding was that petitioners were not entitled to the protection of the actual malice standard because consumer affairs reporting itself is not worthy of the standard's protection:

> "Criticism of commercial conduct does not deserve the special protection of the actual malice test." (25 Cal. 3d 763, 770, 160 Cal. Rptr. 97, 603 P.2d 14 (1979).)

Thus, under the decision of the California Supreme Court, the actual malice standard can have no application to consumer affairs reporting in California or in any other jurisdiction that looks to California for guidance. This is true regardless of whether the plaintiff is a public figure. If this Court permits the decision to stand, broadcasters will be stripped of the actual malice standard's protection and will become unduly vulnerable to those who defraud or endanger the public with deceptive merchandising practices or defective products. Without the protection of the actual malice standard, marketplace profiteers will convincingly threaten broadcasters with expensive and harassing lawsuits and thereby attempt to supress information that alerts the public to their practices.

Amicus NAB and its members believe strongly that the decision of the California Supreme Court is a major impediment to broadcasters seeking to discharge their obligation to arm the public with knowledge about market-place predators. Amicus, therefore, has a strong and immediate interest in urging this Court to issue a writ of *certiorari* so that it may review, and ultimately reverse, the California Supreme Court's decision.

REASONS FOR GRANTING THE WRIT

The first issue is whether broadcasters who provide consumer affairs reporting will be denied the protection of the actual malice standard in defamation actions regardless of whether the plaintiff is a public figure. This issue is squarely presented because the California Supreme Court held that the actual malice standard has no application to any consumer affairs reporting whatsoever. According to the court, the subject matter itself is inherently unworthy of protection.

Amicus NAB shows herein that courts other than the California Supreme Court regularly apply the actual malice standard in defamation actions arising out of consumer affairs reporting. California is unique in its failure to value a class of reporting that is praised in other jurisdictions for the assistance it affords the public.

Amicus further shows herein that the California court's decision directly contravenes *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and thereby violates the First and Fourteenth Amendments to the U.S. Constitution as well. The "subject matter" test applied – or, more accurately, misapplied – by the California Supreme Court was specifically rejected in *Gertz*.

The second issue of concern to amicus NAB arises from the holding of the California Supreme Court that there is no distinction between a corporate and an individual plaintiff for purposes of a defamation action. Amicus NAB establishes herein that a difference does exist. Corporations cannot suffer shame, humiliation or other mental anguish. Under the reasoning of *Gertz*, this difference justifies requiring corporate defamation plaintiff to prove actual malice whenever they are engaged in matters of legitimate public interest.

1. The California Supreme Court Misapplied an Unconstitutional Test in Holding that Consumer Affairs Reporting Does Not Merit the Protection of the Actual Malice Standard

A. Courts other than the California Supreme Court regularly apply the actual malice standard in defamation actions arising out of consumer affairs reporting.

Counsel for NAB knows of no court other than the California Supreme Court that has denigrated or even questioned the value of consumer affairs reporting. Quite the contrary is true. Numerous courts have recognized the necessity of such reporting if the public is to be protected from those who would prey upon it. In their petition for writ of *certiorari,* petitioners quote from several cases which the California Supreme Court itself cited approvingly and which praise consumer reporting.

Courts other than the California Supreme Court uniformly apply the actual malice standard where the underlying news reports are consumer oriented. *E.g., Yiamouyiannis v. Consumers Union,* 5 Med. L. Rep. 1174 (S.D.N.Y. May 30, 1979) (health hazards of water flouridation); *Steaks Unlimited, Inc. v. Deaner,* 468 F. Supp. 779 (W.D. Pa. 1979) (method of selling and quality of meat sold to public, *citing, inter alia,* the California Court of Appeal opinion in this case); *Hoffman v. Washington Post Co.,* 433 F. Supp. 600 (D.D.C. 1977), *aff'd,* 578 F.2d 442 (D.C. Cir. 1978) (efficacy of protein tablets as dietary supplements); *Trans World Accounts, Inc. v. Associated Press,* 425 F. Supp. 814 (N.D. Cal. 1977) (techniques of debt collecting corporation); *Reliance*

Insurance Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977) (corporation's preliminary prospectus and proposed stock offering); *American Benefit Life V. McIntyre,* 375 So.2d 239 (Ala. Sup. Ct. 1979) (solvency of insurance company); *Bindrim v. Mitchell,* 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied,* 100 S. Ct. 490 (1979), *reh. denied,* 100 S. Ct. 713 (1980) ("nude marathon" group therapy); *Korbar v. Hite,* 43 Ill. App. 3d 636, 357 N.E.2d 135 (1976), *cert. denied,* 434 U.S. 837 (1977) (operation of a credit union); *Silence v. Journal Star Printing Co.,* 201 Neb. 159, 266 N.W.2d 533 (1978) (presence of drugs in restaurant food); *Childs v. Sharon Herald,* 5 Med. L. Rep. 1679 (Pa. Ct. C.P. July 23, 1979) (legality of conduct of bailbond industry).

Courts other than the California Supreme Court also apply the actual malice standard to criticism of those who criticize commercial conduct. *E.g., Edwards v. National Audubon Society,* 556 F.2d 113 (2d Cir.), *cert. denied,* 434 U.S. 1002 (1977) (scientists who publicly advocated use of DDT); *Gibson v. Maloney,* 231 So. 2d 823 (Fla. App.), *cert. denied,* 398 U.S. 951 (1970) (newspaper publisher who aroused public against interests controlling a local telephone company); *Beatty v. Ellings,* 285 Minn. 293, 173 N.W.2d 12 (1969), *cert. denied,* 398 U.S. 904, *reh. denied,* 399 U.S. 917 (1970) (individual opposing urban renewal project); *Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.,* 46 N.Y. 2d 1065, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979) (humane organization accused of slaughtering seals to inflame public against fur industry); *Nader v. De Toledano,* 408 A.2d 31 (D.C.C.A. 1979) (consumer advocate accused of falsifying and destroying evidence to generate controversy over an automobile); *Exner v. American Medical Association,* 12 Wash. App. 215, 529 P.2d 863 (1974) (doctor who opposed flouridation).

Amicus NAB has no explanation for the California Supreme Court determination to single out consumer affairs reporting as unworthy of the actual malice standard's protection. The public needs information to protect itself from those who may sell deceptively and who may offer defective, dangerous products. What the California Supreme Court decision does is to arm marketplace malefactors with a bludgeon for use against broadcasters. By threatening protected, expensive, harassing litigation, they will seek to still the flow of information to the public about their activities. The result will be injury to the public.

B. Not only did the California Supreme Court misapply the "subject matter" test for application of the actual malice standard, the standard itself is unconstitutional.

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), took courts out of the business of determining " 'what information is relevant to self-government' ". 418 U.S. at 346. The holding in *Gertz* was that the First Amendment to the U.S. Constitution required application of the actual malice standard in all defamation actions against communications media where the plaintiff was a public figure or official. Under *Gertz* it is not the subject matter of the allegedly defamatory communication that determines application of this standard, but the character of the plaintiff as a public or private individual.

Here, the California Supreme Court paid lip service to *Gertz* but refused to apply its holding. Rather than consider the character of the plaintiffs, it focused on the subject matter of the communication. It refused to apply the actual malice standard because it did not believe that criticism of commercial conduct merited protection.

That *Gertz* is intended to bind the states is apparent from the opinion itself. It states specifically that states are free to deny broadcasters or publishers the protection of the actual malice standard only when the plaintiff is a private individual. 418 U.S. at 347. That this Court acted wisely in taking the judiciary out of the business of determining the worth of communications is apparent from the decision of the California Supreme Court reached an entirely anomalous result when it focused on the subject matter of the communication rather than the character of the plaintiff. It excluded from the protection of the actual malice standard a type of programming that is generally considered to possess the highest worth.

2. In Refusing to Distinguish Between Individual and Corporate Defamation Plaintiffs, the California Supreme Court Failed to Apply the Reasoning of Gertz v. Robert Welch, Inc.

The California Supreme Court refused to distinguish between individual and corporate defamation plaintiffs and held as follows:

> "[T]here is no distinction between protectable interest and reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages." (25 Cal. 3d 763, 770, 160 Cal. Rptr. 97, 603 P.2d 14).

The California Supreme Court's holding fails to recognize the obvious principle long recognized at common law that a corporate defamation plaintiff, unlike a natural person, cannot suffer mental anguish. *See, e.g., Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, 378 F.2d 377 (5th Cir. 1967); *National Refining Co.*

v. *Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir.), *cert. denied*, 275 U.S. 570 (1927); *Security Benefit Association* v. *Daily News Publishing Co.*, 299 F. 455 (8th Cir. 1924); *Golden Palace, Inc.* v. *National Broadcasting Company*, 386 F. Supp. 107 (D.D.C. 1974), *aff'd*, 530 F.2d 1094 (D.C. Cir. 1976). Corporations do not have sleepless nights.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court recognized that the "public figure" test represented an accommodation between the societal need to avoid self-censorship by the news media and the right of an individual to claim compensation for injury caused by defamatory falsehoods. 418 U.S. at 341. Because corporations can only sustain monetary injury and not mental anguish, they need less protection than individuals and it is necessary to strike a different accommodation between the competing forces identified in *Gertz*. Less weight need be given to protecting corporate defamation plaintiffs and more to the societal need of avoiding media self-censorship. Although the right of a corporation to seek compensation for financial injury is important, this Court noted in *Gertz* that the Court was "especially anxious to assure to the freedoms of speech and press the 'breathing space' essential to their fruitful exercise". 418 U.S. 342.

As noted in the petition for writ of *certiorari*, a United States District Court in *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947 (D.D.C. 1976), struck the accommodation between the competing interests where, as here, the defamation plaintiffs are corporations. So long as the communication in issue concerns a matter of legitimate public interest, the court in *Martin Marietta* held that a corporate defamation plaintiff must prove actual malice. Amicus NAB supports this as a standard of liability. It provides adequate protection to cor-

porations while recognizing the importance of maintaining communications media that can inform the public of deceptive practices and dangerous products.

CONCLUSION

As the principal spokesman for the broadcast industry, Amicus NAB urges that this Court grant the petition for a writ of *certiorari.* The decision of the California Supreme Court fundamentally misinterprets *Gertz* v. *Robert Welch, Inc.* and, in so doing, jeopardizes the ability of broadcasters to program consumer affairs reporting. Without the protection of the actual malice standard, broadcasters will have a tendency to exercise greater self-censorship and the public will lose an important source of knowledge.

Date: April 18, 1980

Respectfully submitted,

ERWIN G. KRASNOW
Attorney for National
Association of Broadcasters
as Amicus Curiae

Stephen E. Nevas
Of Counsel

ACTION FILED
APR 19 1980

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., CHRISTINE LUND,

Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

MOTION OF THE TIMES MIRROR COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE, AND BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE.

ROBERT C. LOBDELL AND
ROBERT S. WARREN,
515 South Flower Street,
Los Angeles, Calif. 90017,
Attorneys for The Times Mirror Company.

GIBSON, DUNN & CRUTCHER,
PHYLLIS GLASS,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., CHRISTINE LUND,

Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

Motion of the Times Mirror Company for Leave to File Brief as Amicus Curiae in Support of Petition for Writ of Certiorari to the Supreme Court of the State of California.

The Times Mirror Company ("Times Mirror") respectfully moves hereby for leave to file the attached brief as *amicus curiae* in support of the petition of American Broadcasting Companies, Inc. and Christine Lund for a writ of certiorari to the Supreme Court of California. Consent to the filing of said *amicus curiae* brief has been obtained from the petitioners. Respondents have refused to consent.

Times Mirror publishes the *Los Angeles Times*, which has a general daily circulation of more than one million copies, the *Orange Coast Daily Pilot* (a California community newspaper), and newspapers in New York, Texas and Connecticut. As a major California newspaper publisher, Times Mirror has a vital interest in the adverse effects certain to result from the California Supreme Court's misapplication of the principles enunciated by this Court in *New*

York Times Co. v. Sullivan, 376 U.S. 254 (1964) and in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967). Unless reviewed and corrected by this Court, the California Supreme Court's decision is certain to deprive the public of access to vitally important reporting concerning consumer affairs.

Petitioners' brief does not focus upon the fact that respondents' voluntary and active solicitation of public support and patronage through advertising served to confer public figure status upon them as a matter of law, at least with respect to nonmalicious speech critical of that advertising. Times Mirror seeks leave to file the attached brief as *amicus curiae* to develop that argument.

DATED: April 18, 1980.

Respectfully submitted,

ROBERT C. LOBDELL AND

ROBERT S. WARREN,
Attorneys for The Times Mirror Company.

GIBSON, DUNN & CRUTCHER,
PHYLLIS GLASS,
Of Counsel.

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., CHRISTINE LUND,

Petitioners,

vs.

WESTERN INSTITUTE OF RETAILING, INC., VEGOD CORPORATION,

Respondents.

BRIEF OF THE TIMES MIRROR COMPANY, AMICUS CURIAE

STATEMENT OF INTEREST

The Times Mirror Company ("Times Mirror") respectfully presents this brief as *amicus curiae* on motion in support of the Petition for Writ of Certiorari filed by American Broadcasting Companies, Inc. and Christine Lund. Times Mirror's vital interest in these proceedings stems from its publication of the *Los Angeles Times*, a privately owned metropolitan newspaper with a general daily circulation in excess of one million copies, as well as from its ownership of a California community newspaper, the *Orange Coast Daily Pilot* (Costa Mesa, California). Additionally, Times Mirror publishes newspapers in New York, Texas and Connecticut.

Times Mirror has an obvious concern with the constitutional propriety of a California Supreme Court decision which drastically cuts away from the first amendment pro-

tections afforded by this Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that regard, Times Mirror has participated in key California cases relating to the application of the first amendment to press publications. *See, e.g., Yorty v. Chandler,* 13 Cal.App.3d 467, 91 Cal.Rptr. 709 (1970).

QUESTION PRESENTED

Is a business which widely appeals and advertises for the trade of public consumers a "public figure," at least insofar as criticism of the truthfulness of that advertising is concerned?

ARGUMENT

The facts have been described in the opinion below and quoted in petitioners' brief. In sum, two distress merchandising concerns took over the liquidation sale of a prominent, high quality San Francisco department store and advertised widely for customers. Defendant television station, acting on the basis of information supplied by the Better Business Bureau, criticized the advertising campaign, suggesting that the good name of the department store was being used to sell inferior merchandise. The question presented is whether the advertisers (referred to collectively as Vegod Corporation) are "public figures" required to prove constitutional malice in their defamation action against the petitioners.

The trial court found Vegod Corporation to be a public figure as a matter of law; the intermediate court of appeal affirmed. However, the California Supreme Court, in an opinion sure to constrict critical news reporting of business and consumer affairs, held that Vegod was not a public figure:

> Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (*Herbert v. Lando* (1979) — U.S.— ,— , [60 L.Ed.2d 115,129, 99 S.Ct.—]), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.

Vegod Corp. v. American Broadcasting Companies, Inc., 25 Cal.3d 763, 770, 160 Cal.Rptr. 97, 101, 603 P. 2d 14, 18 (1979) (footnote omitted).

On its face, the California Supreme Court opinion contradicts the "public figure" concepts set forth by this Court in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1967). In *Butts*, the defendant magazine had reported upon an alleged "fix" of a football game involving the well-known coach of the University of Georgia team. In *Walker*, the Associated Press had reported upon riots occurring on the campus of the University of Mississippi; its dispatch reported that the libel plaintiff, retired General Walker, had led the unruly mob and incited them to unlawful acts. In finding Butts and Walker to be "public figures" required to prove constitutional malice in their actions against the defendants, this Court in its plurality opinion relied upon the common law tort definitions of "public figures":[1]

> We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in New York Times. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. See Spahn v Julian Messner,

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[1]Undoubtedly, Butts was the prototypical "all purpose" public figure, and Walker the prime example of the "vortex" public figure, later described in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974):

> Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment. *Id.* at 345.

> Inc., 18 NY2d 324, 221 NE2d 543, remanded on other grounds. 387 US 239, 18 Led 2d 744, 87 SCt 1706. Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. Whitney v California, 274 US 357, 377, 71 L ed 1095, 1106, 47 SCt 641 (Brandeis, J., dissenting).

Id. at 154-155.

Butts and *Walker* was, in turn, a logical extension of *New York Times Co. v. Sullivan*, which had elevated the common law privilege of "fair comment" expressed in *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908), to constitutional dimension. That privilege was not restricted to public officials such as those involved in *Coleman* and *New York Times*, but also extended to criticism of others who held themselves out for public approbation and acceptance. *See, e.g., Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901) (theatrical performers); W. Prosser, Law of Torts 822 (4th ed. 1971).

Cases applying *Butts* and *Walker* have, in accordance with common law concepts, held to be public figures such diverse individuals as the biographer of a prominent author,[2] a well-known TV entertainer,[3] a "playmate of the month,"[4]

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[2]*Hotchner v. Castillo-Puche*, 404 F.Supp. 1041 (*S.D.N.Y. 1975*), *rev'd on other grounds*, 551 F.2d 910 (2d Cir. 1977), *cert. denied sub nom. Hotchner v. Doubleday & Co., Inc.*, 434 U.S. 834 (1977).

[3]*Carson v. Allied News Co.*, 529 F.2d 206 (*7th Cir. 1976*).

[4]*Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E. 2d 1211 (*Ind. App. 1978*).

the author of a letter to a newspaper,[5] a belly dancer,[6] a weightlifting coach[7] and a football player.[8] A salient feature of these cases is that the libel plaintiff in each was one who had solicited public approval or patronage and thus was required to endure nonmalicious public criticism. In the words of this Court, each had "invite[d] attention and comment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).[9]

Applying these principles to the case at hand, it seems obvious that Vegod Corporation is a "public figure" required to submit to nonmalicious criticism respecting its advertising campaign. Just as surely as do actors, authors, sports figures and retired generals haranguing a mob, Vegod Corporation voluntarily and actively solicited public approval, as well as the public's hard-earned consumer dollars. Its campaign for those dollars was mounted in the media and its appeal was aimed at the entire consuming public in

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[5]*Wright v. Haas*, 586 P.2d 1093 (Okla. 1978).

[6]*James v. Gannett Co.*, 40 N.Y. 2d 415, 353 N.E. 2d 834 (1976).

[7]*Hoffman v. Washington Post Co.*, 433 F.Supp. 600 (D.D.C. 1977), *aff'd mem.* 578 F. 2d 442 (D.C.Cir. 1978).

[8]*Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979).

[9]The concept of the existence of a public "controversy" is not relevant in cases involving those who otherwise voluntarily solicit public approbation or patronage. A preexisting controversy regarding an actor's performance is not required to justify criticism of that performance; the absence of a preexisting "controversy" is, however, of great significance when the plaintiff has not held himself out for public approval and his involvement in a controversy arising only from the defamatory publication is itself advanced as the reason for imposing public figure status. *See Hutchinson v. Proxmire*, 99 S.Ct. 2675 (1979); *Wolston v. Reader's Digest Ass'n Inc.*, 99 S.Ct. 2701 (1979).

In the present case, Vegod Corporation voluntarily engaged in widespread advertising designed to elicit the approval and patronage of consumers. Requiring the presence of a preexisting "controversy" concerning the truthfulness of such advertising would impose the most severe burden upon the speaker who best serves the public interest by first revealing the secret fraud.

the San Francisco area. Nevertheless, because of its notions regarding the relative importance of the content of ABC's speech respecting Vegod's conduct, the California Supreme Court impermissibly found Vegod Corporation not to be a public figure. The California court's analysis is wrong for two reasons.

First, this Court has repeatedly held that the protection of speech is not to be determined by the presumed importance of its content. Accordingly, speech which constitutes mere "entertainment" is entitled to full constitutional protection, *see Kingsley International Pictures Corp. v. Regents of the University of New York*, 360 U.S. 684, 690 (1959); *Winters v. New York*, 333 U.S. 507, 510 (1947), as is speech which may lead to undesirable social results, such as "blockbusting." *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977).[10]

Second, any thought that the commercial speech criticized by ABC was of no particular public importance runs directly counter to recent decisions of this Court. *See Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). As stated in *Bates*:

> [T]he consumer's concern for the free flow of commercial speech often may be far keener than his concern

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[10]Although a state may impose reasonable time, place and manner restrictions on the expression of protected speech, "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Arguably, the California Supreme Court's decision to hold the news media to a higher standard of care in reporting commercial affairs than that to which they must conform when reporting public affairs of a non-commercial nature amounts to an impermissible restriction on speech based solely upon its content.

> for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising though entirely commercial, may often carry information of import to significant issues of the day. See *Bigelow v. Virginia*, 421 U.S. 809 (1975). And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. See *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603-604 (1967) (Harlan, J., concurring). In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.

433 U.S. at 364.[11]

The proper analysis to be applied to Vegod Corporation clearly is that applied to the Reliance Insurance Company in *Reliance Insurance Company v. Barron's*, 442 F.Supp. 1341 (S.D.N.Y. 1977). In holding a company presenting its stock to the public for purchase to be a "public figure" required to submit to nonmalicious criticism of the truthfulness of its prospectus, Judge Brieant noted:

> Insurance was, at the time of the libel, offering to sell its stock to the public, thereby voluntarily thrusting itself into the public arena, at least as to all issues affecting that proposed stock sale. Accordingly, it is clear that Insurance is certainly a public figure with

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[11]The news report at issue here was not, of course, commercial speech, but a form of expression which traditionally has received full first amendment protection. Therefore, even if commercial speech is entitled to less first amendment protection than traditionally protected forms of speech, there is no constitutionally permissible basis for the California court's holding that news criticism of such speech is itself entitled to less first amendment protection.

> respect to issues involving its offering of securities to the public.

Id. at 1348 (footnote omitted). In addition, Judge Brieant observed that "[a]lthough Insurance did not have access to the media during the period of registration, because of peculiarities of federal securities law, it does have and has exercised its access to 'channels of effective communication.' (*Gertz*, 418 U.S. at 344, 94 S.Ct. 2997)." *Id.*

At least with respect to issues concerning its advertising, Vegod Corporation was a public figure with demonstrated "access" to the public. It was able to, and did, effectively employ media channels to convey to the public its views that the wares it was selling should be purchased. The effect of the decision of the California Supreme Court is to deny the public access to nonmalicious criticism of such advertisements aimed at alerting consumers to their deceptive nature. No principle of preserving interests in private reputations justifies so adverse a societal result.

CONCLUSION

The decision of the California Supreme Court seriously misapplies the "public figure" concept enunciated by this Court in *Curtis Publishing Company v. Butts* and *Associated Press v. Walker*, which was in turn based upon common law principles of fair comment. Unless reviewed and corrected by this Court, that decision is certain to dampen vital reporting respecting consumer affairs, leaving the field open

only to those with access to the public through their ability to purchase advertising and depriving the consumer of essential, nonmalicious criticism of the truthfulness of that advertising.

Respectfully submitted,

ROBERT C. LOBDELL and
ROBERT S. WARREN,
Attorneys for
The Times Mirror Company.

GIBSON, DUNN & CRUTCHER,
PHYLLIS GLASS,
Of Counsel.